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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 1015

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois.

Respondents.

(On Writ of Certiorari to the Supreme Court of Illinois)

BRIEF OF RESPONDENT JOSEPH WOODS, Sheriff of Cook County, Illinois.

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WILLIAM C. WITHERSPOON,

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vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois.

Respondents.

(On Writ of Certiorari to the Supreme Court of Illinois)

BRIEF OF RESPONDENT JOSEPH WOODS, Sheriff of Cook County, Illinois.

QUESTION PRESENTED

Whether the excusing for cause of all prospective jurors who expressed conscientious or religious scruples against the infliction of the death penalty deprived petitioner of a jury which fairly represented a cross section

of the community and assured the state of a jury whose members were partial to the prosecution on the issue of guilt or innocence, in violation of the petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

On April 24, 1959, petitioner drove his car from Detroit to Chicago. (R. 1421-30, A. 133-34).* There were at this time outstanding arrest warrants charging petitioner with two armed robberies, April 19, and April 22, 1959, in Wayne County, Michigan. (R. 1282-83, A. 72-80). Upon his arrival in Chicago petitioner and a companion had a pistol and a quantity of stolen jewels. On April 27, a federal warrant charging petitioner with unlawful flight to avoid prosecution was issued by a United States District Court in Michigan. (R. 1284, A. 81-86). On the evening of April 28, the petitioner and his companion arrived at the vicinity of 11th Street and Wabash Avenue in Chicago. Petitioner was carrying the loaded pistol brought from Detroit. (R. 1428-32, A. 134-35); he testified he had the loaded pistol on his person for 10 to 12 hours (Abst. 137, R. 1441) as he traveled about Chicago. He then met with a Helen Murray at a tavern and, according to different versions told by petitioner, he either gave her $50.00 to spend the evening with him or sought her aid in securing a fence for the stolen jewels. (R. 1430, A. 134; R. 1293, A. 91; R. 1390, A. 123). Around 4:00 A.M. the petitioner and Helen Murray began to argue on the sidewalk outside a restaurant they had just left. Petitioner grabbed Miss

* "A" refers to the Abstract filed by petitioner on his original appeal to the Illinois Supreme Court.

Murray but she pulled free and ran to a nearby cruising police car which had stopped on its beat for a red light. She told uniformed Officers Stone and Marzillo that petitioner was carrying a gun. She pointed at the petitioner (R. 1396) (R. 1056-7) The petitioner, hearing the conversation fled and was chased by Officer Stone to a parking lot. (R. 1052-1058, A. 5, 6, 9) (R. 1066-76, A. 8-11) (R. 1294, A. 92). Petitioner hid in a trailer. Officers Marzillo and Stone flashed their flashlights into the lines of parked trucks and (A. 6; R. 1058-9) suddenly petitioner jumped down and started to run with Officer Stone in pursuit and yelling at Witherspoon (A. 7, R. 1058). Petitioner ran a block and a half to another parking lot where he again hid in a trailer. Officer Stone came to the lot, began searching the trailers, flashing his flashlight, he caught the defendant in his hiding place, saying: "You've got a gun. The girl told me. I want it." (A. 127; R. 1401-2) He then conducted what petitioner called a "very bad" search of petitioner and failed to find a gun. The officer told petitioner to get out of a trailer in which he had hidden. (R. 1400-03, A. 126-27) (R. 1295, A. 93). Then in petitioner's words, "as I approached the policeman, I fired a shot at him." (R. 1268-69, A. 66-67). After this petitioner and the officer exchanged shots, petitioner kicked the wounded officer's hand and knocked the officer's service revolver from his grasp. Petitioner testified he was "interested in getting out of the area quickly" (A. 138; R. 1449). He further testified "the only one I was concerned about that night was Witherspoon" (A. 139; R. 1450). Petitioner fled to a gas station where he had previously parked his car. He made no effort to help or to secure medical aid for the dying officer. (R. 1450, A. 139) (R. 1075-76, A. 10-11) (R. 1135-37, A. 25) (R. 1297, A. 94)

(R. 1403, A. 127). However, rather than going to his car he asked the gas station attendant to call a cab. (R. 1448-9; A. 138) He hid the gun in a toilet flush tank at the station when he saw police approaching. He was taken in custody (R. 1405-07, A. 128) and brought to a hospital where the dying Officer Stone identified him as "the man that shot me." (R. 1062, A. 8). Officer Marzillo also identified petitioner (R. 1109-10, A. 19) who was then taken back to the gas station. On the way he admitted that he shot Officer Stone and at the gas station he identified the gun which police found in the flush tank as the gun with which he shot Officer Stone. (R. 1110-11, A. 19, R. 1120-21, A. 22). Then petitioner was taken to police headquarters where he explained the shooting in these terms: "The officer was doing his job and it was my job—I was trying to avoid arrest (R. 1450, 1297, A. 94, 139). I had a job to do. I was hot and I didn't want to be taken in. I was wanted for robberies in Detroit, I had been in the penitentiary before and I didn't want to go back, that's why I shot." (R. 1228, A. 54). After giving these statements, petitioner went to sleep and on his awakening he inquired as to the health of Officer Stone and was informed that Stone had died. (R. 1468, A. 143). He refused to sign or give any further statements thereafter.

Petitioner was indicted in October, 1959 and was tried in April, 1960. He was represented by three court-appointed counsel. The jury was selected from a venire of ninety-five persons. Forty-seven persons were excused because of religious or conscientious scruples against inflicting the death penalty. Three were excused because of lack of fairness or impartiality. The prosecution used fifteen and the defense used eighteen of their allotted twenty peremptory challenges. Petitioner did not challenge for cause any

of the jurors finally selected to try him. Petitioner did not object to the court's action in excusing any juror for cause nor did petitioner object to the form of questioning used to determine death penalty scruples. Petitioner did not seek to examine further any jurors expressing scruples against the death penalty.

The trial ended on April 20, 1960, with the jury's verdict finding petitioner guilty and fixing his punishment at death. On April 25, 1960, judgment was entered on the verdict.

The subsequent course of litigation is summarized briefly by petitioner. A more detailed summary and a more detailed statement of the facts of the crime are found in Respondent's Brief In Opposition to the Petition For certiorari.

SUMMARY OF ARGUMENT

Every federal court and nearly every state has allowed the prosecution to challenge for cause in a capital case any juror who has conscientious or religious scruples against inflicting the death penalty. The petitioner attacks this procedure on three grounds: first, that the excusing of such jurors is without rational foundation; second, that the resulting jury is not a representative jury, and third, that the resulting jury is not a fair and impartial jury.

The excusing of jurors with conscientious scruples against inflicting capital punishment has a clear rational foundation. The very meaning of a conscientious scruple imports the presence of a belief of such nature as to impede ability to render a fair and impartial verdict in a capital case. The petitioner never objected to the excusing of any juror for cause and never sought to ques-

tion any juror to clarify any doubt about the meaning of the juror's scruples. Further, in the light of the questioning of several jurors which was heard by all jurors present in the courtroom, the jurors who said they had conscientious scruples may be assumed to have known what the court was seeking in its questioning. If the answers given by the veniremen were given in response to questions about the presumption of innocence or the insanity defense or willingness to refuse to give the death penalty the petitioner would be entitled to a challenge for cause.

The jury was a representative jury. No deliberate effort was made to exclude persons of any race, religion, political party, sex or economic class. Those who have death penalty scruples do not constitute the kind of class whose arbitrary exclusion is disapproved by this Court. In any event the exclusion is not arbitrary, being based upon the State's legitimate interest in enforcing its criminal laws. The use of public opinion polls to support petitioner's argument is improper and insubstantial. If a party's right to challenge for cause rests on poll results, then the rights of parties must necessarily fluctuate with day to day changes in poll results.

The jury that tried petitioner was fair and impartial. Each juror swore to his fairness and each juror was either tendered or accepted by petitioner without challenge for cause. The studies offered by petitioner do not reveal that the jurors were in fact unfair. One study actually supports the notion that there is no statistically significant difference between jurors with and without death penalty scruples. The reliance of petitioner on the concept of the authoritarian personality is misplaced since the existence of such a personality depends on much more than the presence or absence of scruples against capital punishment. Every court faced with these arguments has rejected them.

The State had a legitimate interest in using a single jury to decide questions of guilt and punishment. The use of a bifurcated trial or of judicial sentencing will not eliminate the use of challenges for cause against jurors with death penalty scruples. The alternative procedures suggested by petitioner probably operate to the detriment of a defendant on trial for his life. The vast majority of states as well as the federal jurisdiction use the Illinois procedure in capital cases.

The petitioner's argument is an attack on the present voir dire method of selecting a jury. If petitioner's argument is accepted, the notion that fairness can be determined by simple direct questions to a venireman under oath must yield to a program of psychological testing of the venire with a psychologist rather than a judge determining the fitness of a juror. Certainly the juror qualification statutes prevalent in all states could not stand against a psychological attack. Further, the assumption underlying the petitioner's argument is that a defendant has the right to have a jury nullify the law. No man should have this right. If a defendant did possess this right, then it is doubtful that a single conviction could be obtained under laws with which a fairsized body of citizens are in disagreement. The most notable example of this is trials involving or arising out of civil rights violations in certain regions of this country.

ARGUMENT

I.

THE PETITIONER WAS TRIED BY TWELVE FAIR AND IMPARTIAL JURORS DRAWN INDISCRIMINATELY FROM AMONG THOSE ELIGIBLE IN THE COMMUNITY FOR JURY SERVICE, UNTRAMMELLED BY ANY ARBITRARY EXCLUSIONS.

A. Introduction.

The disqualification in a capital case of jurors having conscientious or religious scruples against inflicting the death penalty was first recognized by Mr. Justice Story in United States v. Cornell, 25 Fed. Cas. 650, 655-56; No. 14, 868 (C.C.R.I.) (1820). In 1827, the first state court faced with the issue sustained the right of the prosecution to challenge such a juror. Commonwealth v. Lesher, 17 Serg. & Rawles, 155 (Pa. 1827). In 1857 an English court of review stated that such conscientious scruples were a ground of challenge. Mansell v. The Queen, 8 El. & Bl. 54, 120 Eng. Rep. 20, 32, 41, 42 (Exchequer Chamber). This Court held that a juror having conscientious scruples concerning the death penalty does not stand indifferent between the government and the accused and is not an impartial juror. Logan v. United States, 144 U.S. 263, 298 (1892). By virtue of common law or statute or both nearly every state of the Union has similarly recognized the inability of a juror with conscientious scruples against the death penalty to serve fairly as a juror in a capital case.[1]

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1. UNITED STATES:
United States v. Puff, 211 F. 2d 171, 181-86 (2nd Cir. 1954) cert. denied 374 U.S. 963 (Common law)

The petitioner argues that these cases must be overruled because an individual who does not have conscien-

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Pope v. United States, 372 F. 2d 710, 724-25 (8th Cir. 1967) (Common law)
United States ex rel Dukes v. Sain, 297 F. 2d 799, 802-03 (7th Cir. 1962) cert. den. 369 U.S. 868

ALABAMA:
Garrett v. State, 76 Ala. 18, 20-21 (1884) (Statute)
Logan v. State, 251 Ala. 441, 443, 37 So. 2d 753, 754-55 (1948) (Statute)
Alabama Code, tit. 30, Sec. 57 (1958)

ARIZONA:
State v. Thomas, 78 Ariz. 52, 58, 275 P. 2d 408, 412 (1954) (Common law)
Ariz. Code, Crim. Proc. Rule 219 (A) (14) (1956)

ARKANSAS:
Jones v. State, 58 Ark. 390, 397, 24 S.W. 1073, 1075 (1894) (Statute)
Williams v. State, 186 Ark. 738, 739, 55 S.W. 2d 928, (1933) (Statute)
Ark. Stat. Ann. Sec. 43-1920 (1964)

CALIFORNIA:
People v. Tanner, 2 Cal. 257, 260 (1852) (Statute)
People v. Riser, 47 Cal. 2d 566, 575-76, 305 P. 2d 1, 7 (1956) appeal dismissed 358 U.S. 646 (1958) (Statute)
Cal. Penal, Sec. 1074 (1956)

COLORADO:
Demato v. People, 49 Colo. 147, 149, 111 Pac. 703, 704-05 (1910) (Common law)
Bell v. People, 431 P. 2d 30, 31-32 (Colo. 1967) (Common law)

DELAWARE:
State v. Windsor, 5 Del. 512, 513 (1851) (Common law)
Del. Code Ann. Tit. 11, Sec. 3301 (1953)

DISTRICT OF COLUMBIA:
Funk v. United States, 16 App. D. C. 478, 488-89 (1900) cert. denied 179 U.S. 683 (Common law)
Turberville v. United States, 303 F. 2d 411, 418-21 (D. C. Cir. 1962) cert. denied 370 U.S. 946 (Common law)

FLORIDA:
Metzger v. State, 18 Fla. 481, 486 (1881) (Statute)
Piccott v. State, 116 So. 2d 626 (Sup. Ct. Fla. 1959) cert. denied 364 U.S. 293 (1960) (Statute)
Fla. Stat. Ann. 932.20 (1944)

tious scruples against the death penalty is not a fair and impartial juror in a capital case. It is surprising that the

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GEORGIA:
Williams v. State, 3 Ga. 453 456-58 (1847) (Common law)
Massey v. State, 222 Ga. 143, 151, 149 S.E. 2d 118, 124 (1966) cert. denied, 385 U.S. 36 (Statute)
Ga. Code Ann. Sec. 59-806 (1965)

IDAHO:
State v. Wilson, 41 Idaho 616, 627-28, 243 Pac. 359, 361 (1925) (Statute)
State v. Owen, 73 Idaho 394, 400-01, 253 P. 2d 203, 206-07 (1953) (Statute)
Idaho Code Ann. Sec. 19-2020 (9)

ILLINOIS:
Gates v. People, 14 Ill. 432 (1853) (Common law)
People v. Hobbs, 35 Ill. 2d 263, 270-275, 220 N.E. 2d 469, 473-75 (1966) cert. denied 386 U.S. 1024 (1967) (Common law)

INDIANA:
Gross v. State, 2 Ind. 329 (1850) (Common law)
Perkins v. State, 207 Ind. 119, 122, 191 N.E. 136, 137 (1934) (Common law)
Ind. Ann. Stat. Sec. 9-1504 (1956)

KANSAS:
State v. Latham, 190 Kan. 411, 431-32, 375 P. 2d 788, 803-04 (1962) cert. denied 373 U.S. 919 (1963) (Statute)
Kan. Gen. Stat. Ann. Sec. 62-1404, 1405 (1964)

KENTUCKY:
Tarrence v. Commonwealth, 265 S.W. 2d 40, 40 (1954) cert. denied 348 U.S. 899 (Common law)
Carson v. Commonwealth, 382 S.W. 2d 85, 89 (1964) cert. denied 380 U.S. 938 (1965) (Common law)

LOUISIANA:
State v. Kennedy, 8 Robinson's 590, 594-95 (1845) (Common law)
State v. Jackson, 227 La. 642, 651, 80 So. 2d 105, 107 (1955) (Statute)

MAINE:
State v. Jewell, 33 Maine 583 (1851) (Common law)

MARYLAND:
Corens v. State, 185 Md. 561, 564, 45 A. 2d 340, 343-44 (1945) (Common law)

argument is being heard at this point. At trial the petitioner did not object to the excusing for cause of any juror.

Md. Ann. Code Art. 51, 88 A. (Supp. 1967) barred disqualification of jurors by reason of beliefs against capital punishment but jurors with conscientious scruples as opposed to mere beliefs are still excused in Maryland trial courts.

MASSACHUSETTS:
Commonwealth v. Ladetto, 349 Mass. 237, 246-47, 207 N.E. 2d 536, 542 (1965) (Statute)
Mass. Gen. Law Ch. 278, Sec. 3 (1956)

MISSISSIPPI:
Spain v. State, 59 Miss. 19, 22-24 (1881) (Common law)
Phenizee v. State, 180 Miss. 746, 750-55, 178 So. 579, 580-82 (1937) (Common law)

MISSOURI:
State v. Miller, 156 Mo. 76, 84, 56 S.W. 907, 909 (1900) (Common law)
State v. Odom, 369 S.W. 2d 173, 183-84 (1963) cert. denied 375 U.S. 993 (1964) (Statute)
Mo. Rev. Stat. Sec. 546. 130 (1953)

MONTANA:
State v. Won, 76 Mont. 509, 518, 248 Pac. 201, 203-04 (1926) (Common law)
Mont. Rev. Codes Ann. Sec. 95-1909 (1968 Supp.)

NEBRASKA:
St. Louis v. State, 8 Neb. 405, 412-13, 1 N.W. 371, 373-74 (1879) (Common law)
Rhea v. State, 63 Neb. 461, 469-74, 88 N.W. 789, 790-93 (1902) (Statute)
Neb. Rev. Stat. Sec. 29-2006 (1964)

NEVADA:
Spillers v. State, 436 P. 2d 18, 21-22 (1968) (Statute)
Nev. Rev. Stat. Sec. 175.105 (9) (1959)

NEW HAMPSHIRE:
Pierce v. State, 13 N.H. 536, 556 (1843) (Common law)

NEW JERSEY:
State v. Rios, 17 N.J. 572, 591-92, 112 A. 2d 247, 256-57 (1955) (Common law)
State v. Reynolds, 43 N.J. 597, 602-03, 206 A. 2d 750, 753 (1965) (Common law)

NEW YORK:
People v. Damon, 13 Wend. 351 (1835) (Sup. Ct.) (Common law)

Petitioner did not challenge the fairness or composition of the venire or of the particular panel that finally tried the

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People v. Fernandez, 301 N.Y. 302, 93 N.E. 2d 859, 867-69 (1950), cert. denied 340 U.S. 914 (Common law)
N. Y. Code Crim. Proc. Sec. 377 (Supp. 1967)

NORTH CAROLINA:
State v. Bowman, 80 N.C. 432, 436-37 (1879) (Common law)
State v. Childs, 269 N.C. 307, 317-20, 152 S.E. 2d 453, 460-62 (1967) (Common law)

OHIO:
Blair v. State, 5 Ohio C.C. 496, 504-05 (1891) (Common law)
State v. McClellan, 12 Ohio App. 2d 204, 232 N.E. 2d 414, 416 (1967) (Statute)
Ohio Rev. Code Ann. Sec. 2945.25 (1954)

OKLAHOMA:
Smith v. State, 5 Okla. Crim. 282, 283-85, 114 Pac. 350, 351 (1911) (Statute)
Application of Sharp, — Okla. Crim. —, —, 414 P. 2d 720, 722 (1966) (Statute)
Okla. Stat. Ann. Title 22, Sec. 660 (1937)

OREGON:
State v. Leland, 190 Ore. 598, 624-25, 227 P. 2d 785, 796-97 (1951) aff'd. 343 U.S. 790 (1952) (Statute)

PENNSYLVANIA:
Commonwealth v. Lesher, 17 Serg & Rawles 155 (1827) (Common law)
Commonwealth v. Lopinson, 427 Pa. 284, 234 A. 2d 552, 560 (1967) (Common law)

SOUTH CAROLINA:
State v. James, 34 S.C. 49, 52, 12 S.E. 657, 658 (1890) (Common law)
State v. Robinson, 149 S.C. 439, 442-43, 147 S.E. 441, 442-43 (1929) (Common law)

TENNESSEE:
Cf. Long v. State, 187 Tenn. 139, 144-46, 213 S.W. 2d 37, 40 (1948)

TEXAS:
White v. State, 16 Texas 207, 218 (1856) (Common law)
Jordan v. State, 154 Tex. Crim. 217, 222, 226 S.W. 2d 449, 452 (1950) (Statute)
Texas Code Crim. Proc. Art. 35.16 (1966)

petitioner. The petitioner in fact failed to exhaust his peremptory challenges. The petitioner did not attack the

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UTAH:
State v. Condit, 101 Utah 558, 560-61, 125 P. 2d 801, 802 (1942)
Utah Code Ann. Sec. 77-30-19 (9) (12) (1953)

VERMONT:
State v. Ward, 39 Vt. 225, 231-33 (1867) (Common law)
State v. Shaw, 73 Vt. 149, 153, 50 Atl. 863, 864 (1901) (Common law)

VIRGINIA:
Clore's Case, 49 Va. (8 Gratt.) 691, 694-95 (1851) (Statute)
Hampton v. Commonwealth, 190 Va. 531, 548-49, 58 S.E. 2d 288, 294-95 (1950) cert. denied 339 U.S. 989 (Statute)
Va. Code Ann. Sec. 19.1-210 (1960)

WASHINGTON:
State v. Mahoney, 120 Wash. 633, 640, 208 Pac. 37, 40 (1922)
State v. Leuch, 198 Wash. 331, 333, 88 P. 2d 440, 441-42 (1939) (Statute)
Wash. Rev. Code Sec. 10.49.050 (1961)

WEST VIRGINIA:
State v. Greer, 22 W. Va. 800, 809 (1883) (Common law)

WISCONSIN:
Spick v. State, 140 Wis. 104, 110-11, 121 N.W. 664, 667 (1909) (Common law)

WYOMING:
State v. Aragon, 41 Wyo. 308, 316-17, 285 Pac. 803, 806 (1930) (Statute)
Wyo. Stat. Ann. Sec. 7-224 (1957)
See 48 ALR. 2d 560

CONTRA:

IOWA:
State v. Lee, 91 Iowa 499, 502-03, 60 N.W. 119 (1894) (Decision based solely on omission of challenge for scruples from statute listing specific grounds for challenge in criminal cases.)

SOUTH DAKOTA:
State v. Carrington, 11 S.D. 178, 76 N.W. 326 (1898) But see: S.D. Code Sec. 34. 3618 (Supp. 1960)

fairness of the jury on appeal, nor in his previous collateral proceedings nor in his previous petition for Certiorari. The first attack on the jury was made almost six years after the entry of judgment after all else had failed.[2] See Frazier v. United States, 335 U.S. 497, 503 (1948); Shotwell Mfg. Co. v. United States, 371 U.S. 341, 362-64 (1963).

B. The Excusing of Jurors with Conscientious Scruples Against Inflicting the Death Penalty is Not Without Rational Foundation.

The existence of conscientious or religious scruples against inflicting the death penalty is a sufficient basis for excluding a juror unless one completely ignores the common meaning of the phrase conscientious or religious scruples. Almost every precedent discussing the disqualification for cause speaks in terms of "conscientious scruples."[3] When a man says he has conscientious or re-

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2. The petitioner requested that the jury not decide the issue of penalty but this motion was based on the mistaken theory that evidence in mitigation could not be heard by the jury. The motion had nothing to do with qualifying the jury for the death penalty. The motion has been the subject of previous discussion only in connection with his contention that the fixing of penalty by the jury was *per se*, unconstitutional. (Petitioner Brief in the Supreme Court of Illinois, No. 39387, p. 41; Petitioner's Petition for Certiorari, 379 U.S. 950, p. 24.)

3. Logan v. United States, 144 U.S. 263, 298 (1892)
Young v. State, 38 Ariz. 298, 301-05, 299 Pac. 682, 684-85 (1931)
People v. Miller, 245 Cal. App. 2d 112, 138, 53 Cal. Rptr. 720, 736-37 (1966) cert. granted on other grounds (12/4/67)
Sims v. State, 184 So. 2d 217, 218-20 (Ct. App. Fla. 1966)
Massey v. State, 222 Ga. 143, 150-51, 149 S.E. 2d 118, 123-24 (1966) cert. denied 385 U.S. 36 (1966)
People v. Crump, 5 Ill. 2d 251, 264, 125 N.E. 2d 615, 622 (1955)
Commonwealth v. Lopinson, 427 Pa. 284, 234 A. 2d 552, 560 (1967)
Black v. State, 46 Tex. Crim. 590, 593-94, 81 S.W. 302, 303 (1904)
Hampton v. Commonwealth, 190 Va. 531, 548-49, 58 S.E. 2d 288, 294-95 (1950) cert. denied 339 U.S. 989

ligious scruples against a certain act, he normally means that he will not perform the act under any circumstances. The very notion of a conscientious scruple is one which implies transcendancy over the demands of law and society. See White v. State, 16 Texas 207, 218 (1856). In State v. Favorito, 115 N.J. L. 197, 199-201; 178 Atl. 765, 766-67 (1935) it was held that a juror need not be asked if his scruples will influence his verdict.

For the first time in any court the petitioner argues that the trial court was not strict enough in allowing challenges for cause. This issue was not raised in any prior proceeding. It was not raised in the instant proceeding either in the petition in the Circuit Court of Cook County, in the Brief before the Illinois Supreme Court or the Petition For Certiorari granted by this Court. More importantly there was no objection at trial to the form of the qualifying questions put to the jurors or to the trial court's action in excusing for cause. If defense counsel felt that a proper basis for challenge for cause was not made, they could have asked questions to clarify the status of any juror. They chose not to do so. Frankly, their failure to object indicates not so much a waiver as an understanding that when a man says he has conscientious scruples against doing something he would be unwilling to do it under any circumstances.

Furthermore, in the context of this voir dire it is clear that the veniremen were cognizant of the import of the question. In Illinois, as in most jurisdictions, the entire venire is present in the courtroom while the individual jurors are questioned. The venire is brought into the courtroom and given preliminary instructions concerning the nature of the case and the trial procedure. The veniremen are then sworn as a group. In this case three

venires were called into the courtroom. (R. 633, 731, 843). It is impossible to tell exactly when each new venire came into the courtroom but it is clear that virtually every juror heard the questioning of several previous jurors. The Court specifically instructed veniremen to listen to the examination of other jurors. (R. 636, 851).

The first venire heard the first prospective juror, Mr. Salazar, ask for clarification of the question concerning conscientious scruples. He was asked if he would sign a death verdict if he believed it was a proper case. He replied, "No."

> "THE COURT: In other words, you don't believe that you would vote to inflict the death penalty in any case?
>
> A. No.
>
> Q. In other words, what counsel is getting at is this: If you have a conscientious or religious scruple against the infliction of the death penalty, say so to the gentleman.
>
> A. Yes, sir." (R. 640-644; Petr's. App. 1-2)

After this colloquy no prospective juror could have been in doubt as to what was meant by conscientious or religious scruples against inflicting the death penalty. See Commonwealth v. Gelfi, 282 Pa. 434, 436-38, 128 Atl. 77, 78-79 (1925). At several points throughout the voir dire different veniremen were asked if, after all the evidence was in, they and their fellow jurors were convinced that petitioner was guilty and that the case was a proper one for the death penalty, they would sign a death verdict. (R. 649, 650-51, 655, 659, 663-64; 681; 710, 719-20, 723, 23-A; 728, 738; 751, 757-58, 770, 776-77, 783, 787, 795, 817-18, 823-23A, 828, 841, 856, 864, 902-03, 911; 976, 920, 936, 941; 982; 989-90; 998, 1005, 1016; 1025.) In addition to Mr. Salazar, on five occasions the trial court made it clear

that it was concerned only with persons who would not render the death penalty under any circumstances. (R. 644, 684-85, 715, 944, 991) (Pets's. App. 2, 8, 10, 38, 41).

Petitioner implies that three jurors were excused merely because of opposition to the death penalty.[4] The record reveals that the first of these jurors, during examination by defense counsel, volunteered the statement, "I do not believe in capital punishment" and after questioning by the court testing his belief he further volunteered, "This is my conscientious objection" after which he was excused. (R. 685-86) (Pet. App. 8-9). The second juror stated "I

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4. Petitioner argues that Illinois law allows a venireman to be excused merely for opposition to the death penalty. The point is abstract in this case since no juror was excused because of mere or philosophical opposition to the death penalty. (And to the extent of our knowledge, no venireman has been so excused in a capital case in Illinois nor has any venireman in a capital case been asked merely if he was opposed to capital punishment.) The challenge for cause based on conscientious scruples against inflicting the death penalty arose at common law in Illinois. Gates v. People, 14 Ill. 433 (1853). A statute was enacted to codify and not to extend the law and the standard remained one of conscientious or religious scruples against inflicting the death penalty. People v. Winchester, 352 Ill. 237, 243, 185 N.E. 580, 582 (1933); People v. Crump, 5 Ill. 2d 251, 264, 125 N.E. 2d 615, 622 (1955); People v. Bernette, 30 Ill. 2d 359, 197 N.E. 2d 436 (1964). The challenge for cause continued even when the statute was repealed in favor of a provision not specifying particular grounds for challenge. People v. Hobbs, 35 Ill. 2d 263, 270-75; 220 N.E. 2d 469, 473-75. It should also be noted that other courts with statutes similar to Illinois, along with the ordinary run of men usually understand the statutory use of "conscientious scruples" to mean more than mere beliefs which have no effect on the juror's verdict. O'Rear v. State, 188 Ala. 71, 74, 66 So. 81, 82 (1914); Black v. State, 46 Tex. Crim. 590, 593-94, 81 S.W. 302, 303 (1904); Thompson v. State, 19 Tex. Crim. 598, 618 (1885). The challenge for cause based upon conscientious scruples is a creature of courts not of statutes. The statutes of the various states are usually declaratory of the common law of the state. To the extent that Petitioner's Appendix 2 indicates that the challenge is essentially statutory, it is misleading.

think my conscience would bother me" and indicated his disagreement with the law of the State, (R. 857, Pet. App. 29). The third juror indicated first that she did have conscientious scruples and then said she did not. The trial court insisted that the juror step into the box. After an interval the juror indicated that she would not accept the responsibility for deciding to put somebody to death and alluded to "my conscience." (R. 929, 932-33; Pet. App. 36). Certainly in each of these three cases the trial court's action was justified. The first juror did not even answer a question before insisting on his conscientious objections. The second and third jurors indicated that their beliefs would affect their verdicts. See United States v. Puff, 211 F. 2d at 186. Indeed the reaction of the court toward the third juror indicated the court's reluctance to excuse a juror merely because of opposition to or reluctance about the death penalty.

In Turberville v. United States, 303 F. 2d 411 (D.C. Cir. 1962), cert. denied 370 U.S. 946, the trial court excused jurors who stated merely that they were opposed to capital punishment. The court noted that, as in the present case, no objection was made at trial. The concurring judge specifically noted that if an objection had been made the government would have the opportunity to clarify the record, 303 F. 2d at 422. The Court affirmed the judgment in the face of an argument similar to the one made here. In the exercise of its supervisory power it did suggest that further questioning be conducted in future trials. However, the court's language in discussing the nature of the challenge is very significant.

> "The touchstone in excuse for cause under the doctrine adopted by most courts is a conscientious scruple. This means something more than mere opposition. It

> means an opposition of such nature as to impede ability to render a fair and impartial verdict upon the law and the evidence as it develops in a given case." p. 420

Thus the court in Turberville also recognized the common meaning of a conscientious scruple.

There is a further point to be made with respect to the disqualification of a juror with conscientious scruples. In United States v. Cornell, 25 Fed. Cas. 650, 655-56, Mr. Justice Story suggested that to put a man with a conscientious scruple upon a jury would be to force the juror to violate either his conscience or his oath. And a juror who would violate either is not a fit juror. And it is not without significance that the statutes of Arizona, California, Montana, Minnesota, New York, North Dakota, Oklahoma, Utah and Washington all include the phrase that such a juror shall neither be "permitted nor compelled" to serve on a jury in a capital case. (See Petr's App. 48, 49, 50, 51, 54, 55). Perhaps we are asserting a *jus tertii* but it seems that a trial judge who refuses to put a man to the test of his scruples against his oath should not be reversed because of it.

Petitioner asks what "if the shoe were on the other foot" and persons favoring capital punishment were excluded from the jury. (Petr's Br. p. 24). We note that nearly every federal and state court considering the question has held that the defendant is entitled to challenge for cause any venireman with a bias favoring capital punishment.[5]

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5. UNITED STATES:
Stroud v. United States, 251 U.S. 380, 381 (1920)
See United States v. Puff, 211 F. 2d 171, 182 (2nd Cir. 1954)
CALIFORNIA:
People v. Tanner, 2 Cal. 257, 260 (1852)
People v. Hughes, 57 Cal. 2d 89, 94-95, 367 P. 2d 33, 36 (1961)

Petitioner, in fact, suggests that the ultimate test of the sufficiency of the basis for a challenge for cause when he asks, what "if the shoe were on the other foot". We accept the test and we do not think petitioner would fare very well under the "shoe on the other foot" test. If, as petitioner suggests, persons with conscientious scruples against the death penalty were included on a jury and if the jury were, as petitioner suggests they might, to return a death verdict, what would petitioner have to say about perjury or deliberate deception during voir dire by certain jurors? We have no doubt that petitioner would engage in a course of litigation to rival this case in his attempt to overturn such a verdict.[6] Similarly if a juror were to state that he had "a conscientious or religious scruple" against the defense of insanity, would not the defense rightfully claim

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People v. Pike, 58 Cal. 2d 70, 87, 372 P. 2d 656, 665 (1962) cert. denied 371 U.S. 941

DISTRICT OF COLUMBIA:

Funk v. United States, 16 App. D.C. 478, 487 (1900) cert. denied 179 U.S. 683

Turberville v. United States, 303 F. 2d 411, 421 (D.C. Cir. 1962)

ILLINOIS:

See People v. Hobbs, 35 Ill. 2d 263, 272, 220 N.E. 2d 469, 473-74 (1966)

INDIANA:

Gross v. State, 2 Ind. 329, 330 (1850)

LOUISIANA:

State v. Henry, 196 La. 217, 236, 198 So. 910, 915 (1940)

OHIO:

State v. McClellan, 12 Ohio App. 2d 204, 232 N.E. 2d 414, 416 (1967)

6. It is not without significance that Faye Goldberg, in her study reprinted in petitioner's brief, refers to those having conscientious scruples against the use of the death penalty and yet still vote for it as guilty of "marked inconsistency" (Petr's App. p. 68).

a challenge for cause? See Territory v. Lum Dim, 23 Haw. 792, 795-96 (1917); Jones v. State, 60 Tex. Crim. 139, 142, 131 S.W. 572, 573 (1910). If a juror claimed that because of religious or moral beliefs he would be very reluctant to sanction the taking of human life would not a defendant claiming self-defense be entitled to a challenge for cause? See Webb v. Commonwealth, 314 S.W. 2d 543, 545 (Ky. 1958); People v. Bennett, 79 Cal. App. 76, 89-93, 249 Pac. 20, 25-26 (1926); Cf. Smith v. Smith, 7 Cal. App. 2d 271, 273-274, 46 P. 2d 232, 233 (1935) (religious scruples concerning divorce). The simple fact is that a man's conscientious scruples will, in almost all cases, affect his judgment and preclude his acting contrary to their dictates. The exclusion of such jurors from cases in which their scruples will be called into question cannot be said to be without rational foundation.

C. The Jury That Tried Petitioner Was Not Improperly Constituted.

The jury that tried petitioner was a representative jury indiscriminately chosen from among those eligible in the community for jury service, untrammelled by any arbitrary and systematic exclusions. Hoyt v. Florida, 368 U.S. 57, 59, (1961). The jury was selected at random from the legal voters of the towns and precincts of the county. Ill. Rev. Stat. 1959, Ch. 78, Sec. 25. It is, of course the burden of petitioner to show that his right to a representative jury has been violated. Swain v. Alabama, 380 U.S. 202, 226 (1965).

To meet this burden, petitioner cites certain public opinion polls showing large numbers of persons opposing the death penalty and their relative distribution among racial, religious, educational and economic groups. The polls are subject to numerous technical objections. They do not deal

specifically with Illinois. They are not confined to persons eligible to serve as jurors, they do not deal in terms of conscientious scruples, and they are contradicted somewhat by the poll of jurors in Crosson, An Investigation Into Certain Personality Variables Among Capital Trial Jurors (1966)[7] who found that 73% favored and 27% rejected capital punishment (Crosson, p. 45).

1. *Persons with conscientious scruples against the death penalty do not constitute a definite class within the meaning of the cases prohibiting the systematic exclusion of a class of citizens from jury duty.*

The petitioner's argument is totally without support in the applicable precedents. The cases dealing with the jury-exclusion problem deal solely with exclusion of definite classes on arbitrary grounds. Thus it is arbitrary to exclude jurors on the basis of race, Smith v. Texas, 311 U.S. 128 (1940), ancestry or ethnic affiliations, Hernandez v. Texas, 347 U.S. 475 (1954); or religion, Schowgurow v. State, 240 Md. 121, 213 A. 2d 475 (1965); Jaurez v. State, 102 Tex. Crim. 297, 277 S.W. 1091 (1925). For that matter, it is irrational deliberately to include members of a particular race in a jury panel. Collins v. Walker, 335 F. 2d 417 (5th Cir. 1964) cert. denied 379 U.S. 901 (1964). The jury exclusion cases are concerned therefore primarily with what have been the classic categories of equal protection law: race, religion, and economic status. Petitioner makes no claim, nor could he, that jurors in Illinois are accepted or rejected for political, religious, racial or economic reasons.

Those with conscientious scruples against the death penalty do not constitute the same kind of class with which the

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7. Cited as authority by petitioner in his Petition for Certiorari and by petitioner Bumper in No. 1016.

jury exclusion cases are concerned. Those with scruples against the death penalty are found in every political party, among men and women of all races, all occupations, all ages and all educational backgrounds. They are not an identifiable group and, beyond their views on the death penalty, have no common group interests. In Gorin v. United States, 313 F. 2d 641, 643-44 (1st Cir. 1963) cert. denied 374 U.S. 829 the defendant claimed he was prejudiced by the exclusion of unregistered voters from his jury. The Court properly held that unregistered voters include many sorts of persons without a true common denominator, that they were not the kind of defined group contemplated by the jury exclusion cases. To apply the doctrines developed in the long line of jury-exclusion precedents to this case is to distort them beyond their meaning and cheapen their currency in American life.

The petitioner seeks to elevate the death penalty disqualification into the category of the jury exclusion cases by pointing out that the polls prove the disqualification operates unequally on racial, religious and economic groups. The polls are not consistent on all of these points. Opposition varies with respect to community size but there is no direct correlation; so too with income where opposition varies but not in direct proportion to salary. Religion does not seem to have much effect. Politics shows opposition at the rates of 40% among Republicans, 51% among Democrats and 48% among Independents.

Aside from the fact that these percentages differences are not overwhelming it is not contended by petitioner, and it could not be, that the Illinois practice was deliberately designed to exclude any race, sex, economic or political group. In Hoyt v. Florida, 368 U.S. 57 (1961) this Court was faced with a provision which excluded women

from jury service unless they volunteered. Of course, the practical effect was the virtual absence of women from juries. The Court held that a reasonable policy justified the statute. Significantly a separate concurrence was based on the fact that there was no deliberate effort to keep women off juries. The death penalty disqualification does not operate on any racial, religious or economic group with the extreme effect that the Florida provision had on potential women jurors and its effect is entirely non-deliberate.

There is nothing to indicate that the jury that tried Witherspoon was not representative. (See Appendix A). Of course the religion and politics of the eight men and four women does not appear of record. Salary and economic status can only be inferred from the voir dire. The race of the jurors does not appear nor does that of the petitioner. (In fact, all jurors and the petitioner were Caucasian.) But from what does appear, the jury seems representative.

2. *In any event the exclusion of persons with conscientious scruples is based upon reasonable grounds.*

This Court has never held that the States are obliged to provide a representative jury. All that can be said is that if the State provides a jury it must be a fair and impartial jury. But assuming, arguendo, that a State defendant is entitled to a representative jury and also assuming, arguendo, that those with conscientious scruples against inflicting the death penalty constitute the kind of class to which the jury exclusion opinions are directed, it is clear that the exclusion of such jurors is not arbitrary but is reasonable. And, of course, a reasonable exclusion of a distinct class is not prohibited. Hernandez v. Texas,

347 U.S. at 478. In Hoyt v. Florida, 368 U.S. 57 (1961) this Court upheld a practice which, severely limited the participation of women on the grounds that it is reasonable to exclude women on the basis that their place is in the home and that, only if a woman decides jury duty is consistent with her home life will she serve on a jury. This was despite the fact that the statute was not strictly limited to married women or women with families.

In Fay v. New York, 332 U.S. 261 (1947) jurors were excluded on the basis of conscientious scruples as to penalty, circumstantial evidence, various laws, particular defenses; because of prejudice against defendants who do not testify and because of inability to lay aside opinions acquired from the reading of newspapers. Now although several of these exclusions may not have applied to a given case heard by the juror this Court held that "Each of the grounds is reasonably and closely related to the juror's suitability for the kind of service the special panel requires or to his fitness to judge the kind of cases for which it is most frequently utilized." 332 U.S. at 270. The dissenters did not dispute the doctrines of the majority but based their dissent on the lack of standards beyond a vague intelligence standard given to the jury officials. The dissent concluded that the standard applied "is apparently of an economic or social nature." 332 U.S. at 299.

The present case presents a far stronger justification than either Hoyt or Fay. Unlike Hoyt each excluded juror declares his disqualification in open court. In Hoyt a juror determined her own qualifications and, if the juror had neither family nor pressing duties, she would be excluded without serving the announced State policy. Unlike Fay, the disqualification was based solely on the kind of case that the venireman would hear and not on the basis of the kind of case he was likely to hear. Also unlike

Fay the ground of disqualification here related solely to the issues of the case and not to matters that might not arise.

In short, the exclusion of jurors for conscientious scruples against the death penalty is a reasonable exclusion. This is implicit in the holdings of all the cases sustaining the challenge for cause, supra, pp. 8-13, and it is the explicit ruling of the Circuit Courts of Appeal in United States v. Puff, 211 F. 2d 171 (2nd Cir. 1954), cert. denied 347 U.S. 963 and Pope v. United States, 372 F. 2d 710 (8th Cir. 1967).

3. *The use of public opinion polls to establish or deny legal rights is improper.*

A more important question is the role of public opinion surveys in setting policy. Russell Baker has facetiously suggested that we replace presidential primaries and perhaps even elections with news surveys.[8] Now the results of polls it is suggested should govern judicial decision. We submit that the only true representatives of the community are their elected representatives who this last session defeated a death penalty moratorium bill by a vote of 98 to 68.[9] If opinion polls are to be a substantial factor then legal procedure will change and must change as the polls change. If there is a large uprising of popular sentiment for the death penalty then the death penalty qualified jury is proper. If the reverse is true then the qualified jury is improper. All the trial judge needs to do each day is consult the "Official Court Pollster" and see if the level

9. Illinois Journal of the House of Representatives, May 17, 1967, pp. 33-34 (H.B. 157). In the last decade some form of abolition bill has been presented at each legislative session and each failed of passage.

8. New York Times, March 7, 1968, p. 42.

of opposition to any given law has passed a certain percentage point set by the proper higher Courts.

As a subsidiary issue the Petitioner argues that the procedure allowing the prosecution to elect whether to qualify the jury is a denial of equal protection of the laws. This argument made by petitioner was not presented to the courts below, nor is it to be found in the Petition for Certiorari. In any event the argument is without merit. There is no showing that the conduct of the prosecution in this case arbitrarily put petitioner before a death qualified jury. The murder of a uniformed police officer acting in the line of duty is hardly a poor case for the imposition of the death penalty. The facts of the case pertaining to the petitioner's motive and flippant attitude toward his victim justified the imposition of the penalty. The prosecution, consonant with its duties, made a bona fide effort to obtain the death penalty and the jury returned such a verdict. The record shows no arbitrary exercise of discretion on the part of the prosecution and there is no reason to suppose that the courts of Illinois would allow such to be exercised.

In any event, the fact remains that a death qualified jury is a representative jury and the election of a prosecutor to seek such a penalty does not deprive petitioner of representative jury.

D. The Jury That Tried Petitioner Was Fair and Impartial.

The petitioner contends that the jury that tried him was not fair and impartial. This contention must be viewed in light of the fact that petitioner never claimed and does not now claim that his conviction was not based

on sufficient evidence or was unwarranted. See Fay v. New York, 332 U.S. 261, 265 (1947).

The petitioner, of course, has the burden of showing that the jury that tried him was unfair. Beck v. Washington, 369 U.S. 541, 558 (1962). None of the jurors who finally tried petitioner were challenged for cause by petitioner, nor did petitioner exhaust his peremptory challenges. "It is not easy, and it should not be easy, for defendants to have proceedings set aside and held for naught on constitutional grounds when they have accepted as satisfactory all of the individual jurors who sat in their case." Fay v. New York, 332 U.S. at 282.

1. *The studies offered by petitioner are inconclusive, contradictory and do not purport to measure the fairness or impartiality of jurors.*

To meet his burden petitioner offers the results of certain questionnaires and psychological surveys. Two of these, the Goldberg and Wilson studies, used questionnaires distributed to college students. Goldberg used 200 students and Wilson used 187 students. The results of their studies are not persuasive. The sampling is incredibly small involving less than four hundred students. Indeed another writer, cited by petitioner in his petition for certiorari but dropped from his brief, states "It is doubtful that undergraduates can be representative of the more heterogeneous "twelve good men and true actually serving on juries." Crosson, An Investigation Into Certain Personality Variables Among Capital Trial Jurors (1966).

Neither the Goldberg nor the Wilson studies tested what actually is the function of a juryman in a criminal case, that is, the judgment of credibility of witnesses. The

studies were based on printed summaries of facts of cases. There was no attempt to gauge the reaction of students to actual testimony or even to transcript of testimony. In addition none of the students were instructed, as real jurors would have been, concerning the elements of offenses, the presumption of innocence and the burden of proof beyond a reasonable doubt.

A further glaring error in the studies is their failure to test the effect of collective judgments and the dynamics of jury deliberation, on individual jurors. A verdict is the result of collective judgment processes in which the individual jurors consult, debate, exchange viewpoints, change judgments and opinions in order to reach their verdict, and a test designed to show how an individual reacts to a case without the benefit of group discussion is deficient.

The results of the Goldberg and Wilson studies show only that there is a slightly higher tendency for death qualified jurors to say guilty in response to a narrative about the facts of a case. The percentages are not high. In the Goldberg study, which was the more extensive involving more students and many more fact situations, the qualified jurors reached a guilty verdict in 75% of the cases while the unqualified jurors reached guilty verdicts in 69%. In murder cases the rate was 48% to 41%. In Fay v. New York, 332 U.S. 261, the data, though old, showed a difference of 83% to 43% in convictions in 1933 and a difference of 82% to 37% in 1934 between special jurors who were qualified and regular jurors who were not. The Court said, "No defendant has a right to escape an existing mechanism of trial merely on the ground that some other could be devised which would give him a better chance of acquittal." 332 U.S. at 285. See Moore v. New York, 333 U.S. 565 (1948)

The fundamental defect of the Wilson and Goldberg studies on which petitioner relies is their total lack of relation to the legal standard of impartiality. The findings of the studies are only relative. Just as was true of the statistics in Fay one cannot tell whether the studies reflect "a too great readiness to convict on the part of special juries or a too great readiness to acquit on the part of ordinary juries." 332 U.S. at 280. The same point is implicit in Justice Schaefer's opinion below when he notes that while petitioner attacks death qualified jurors as prosecution prone and therefore not impartial, "the same study indicates that jurors with scruples against the death penalty could be characterized as 'defense prone'." People v. Witherspoon, 36 Ill. 2d 471, 476, 224 N.E. 2d 259, 262 (1967). The studies were conducted without regard for the legal standard of impartiality and prove nothing with regard to that issue. These same materials were before the Eighth Circuit Court of Appeals when the challenge to a death qualified jury was rejected by the Court sitting en banc in Pope v. United States, 372 F. 2d 710, 724-25 (1967).

Petitioner also cites an article by Oberer.[10] Oberer is not a psycholigist and cites no evidence to support his conclusions. He can hardly be considered objective since he describes death scrupled jurors as "the most humane" and death qualified jurors as "those least in touch with . . . the dedication to human charity and understanding." 39 Tex. L. Rev. at 557. Such language is understandable coming from counsel for petitioner but not from one who

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10. "Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt," 39 Texas L. Rev. 545 (1961).

claims to be objective.[11] Oberer relies principally on the concept of the authoritarian personality. His reliance is misplaced. Even Crosson, whose work is plainly designed to provide support for Oberer, states that "Research since the publication of The Authoritarian Personality tends to dispute the unitary quality and consistency of the authoritarian personality envisioned by the [authors upon whom Oberer relies]" Crosson, p. 67.

Crosson's study rather supports the notion that there is no proof that death qualified jurors are biased and partial. This is an interesting result since Crosson clearly set out to support Oberer and other lawyers opposed to death penalty qualification. Crosson, p. 80, 51, pp. 5-10. Crosson, too, refers to his death scrupled jurors as "humanitarian", Crosson, p. 69. Despite his obvious bias Crosson's findings do not support petitioner's position. Crosson's method was to administer the same psychological tests to 36 persons who served as jurors in capital trials and to 36 persons who did not believe in the death penalty but who had served as jurors. The tests were designed to elicit degrees of dogmatism, opinionation, conservatism-liberalism, critical thinking and manifest hostility. These factors are all supposedly related to determining the authoritarian personality. Yet in only one category did death qualified jurors reach a significant level of differentiation, that is they were significantly more conservative. Nowhere does Crosson define what he

11. It could as well be argued logically that the death scrupled juror may be one whose humaneness is very circumscribed and applies only to the people he sees about him. The fate of the storekeeper, the policeman and the man in the street, whose lives the death penalty is designed to protect but whose names and faces he does not know, do not concern him. He is insensitive to the needs and welfare of the millions of individuals who live in his society.

means by conservative but he obviously does not think highly of that condition. On three of the other variables dogmatism, critical thinking and manifest hostility the differences do not reach the limit of statistical significance set by Crosson himself. On the fifth variable it was the unqualified jurors who showed higher levels of opinionation that qualified jurors. Crosson, pp. 59-60. Crosson did not very much like his results. Whenever the literature did not seem to support his thesis, he rejected the professional critiques by citing the opinions of at[illegible]neys, p. 67. Crosson tried to explain the unexpected findings on opinionation by arguing that women are more opinionated than men and they dominated the death scruples group. The author then relied on his "impression" that women seemed to be put on capital juries as often as men and concludes that the women serving on such juries will probably be opinionated conservatives; a rather neat way to turn bad facts to your advantage. The failure of Crosson's study to support the petitioner's thesis is, we submit, especially significant in light of the author's clear bias for petitioner's argument.

The petitioner's argument is based, in substantial part, on the claim that persons without conscientious scruples against the death penalty are "authoritarians". This psychological term of art is grossly misused in this context.

"The Authoritarian Personality" by Adorno, et al., was published in 1950. It began as a study of anti-semitism and mushroomed into an analysis of certain personality characteristics discernible among that group of persons who may be loosely described as "authoritarians". In 1954 a critique and reassessment of the original work was published to which some of the original authors con-

tributed. See Christe and Jahoda "Studies in the Scope and Method of 'The Authoritarian Personality'."

These writers concluded that the authoritarian personality is distinguished by anti-semitism, ethnocentrism and political-economic conservatism. He is rigid in his beliefs (although no evidence for this is presented), he makes frequent use of stereotypes in his political perceptions and judgments, he is sympathetic with the use of violence against his enemies, he distinguishes sharply between his "ingroup" and the "outgroups" which he interprets as menacing his security. More concretely he shares the most commonplace of the vulgar cliches about Jews, foreigners, reformers, homosexuals, intellectuals, and he admires strong men, business men, successful men, manly types who have no tender side or who allow it no play in their lives. (Christe and Jahoda, p. 29)

Petitioner contends that he was tried by a jury made up of "authoritarians" who would have scored high on Adorno's California (or Berkeley) F Scale, the testing device used to measure authoritarian attitudes, while the jurors excluded because of scruples are true humanitarians who would have been the ideal low scorers on the F Scale. In making this argument counsel ignore their own authorities, for the psychologists quite specifically point out that opposition to cruelty and aggressiveness (i.e. scruples against capital punishment) in and of itself means nothing. The most common single symptom characteristic of low scoring men and women on the F Scale was neurotic depression with feelings of inadequacy (manic depressive). (P. 158) In spite of these findings, petitioner would impanel low "F" scorers due to their lack of "extrapunitiveness" regardless of the fact that this may be merely a part of a larger personality pattern which would be

undesirable in any juror. For example, take the juror with conscientious scruples and add the following characteristics which were common among the low scorers interviewed:

1. Signs of inferiority feelings, easily hurt, unhappy, self-critical, fatalistic;
2. Submissive reactions in social situations;
3. Lack of energy and work inhibition.

Result: An anxious ruminator of the obsessive-compulsive type (potential suicide). (P. 160)

The point of all this is not that there is something wrong with people who oppose capital punishment but that you cannot generalize about them, or about people who have no conscientious scruples, as the defense does, without conducting a thorough battery of psychological tests.

By the same token neither can you say that not being against capital punishment is the same as being in favor of it (a postulate the petitioner has never attempted to substantiate), and then move on to the generalization that all persons favoring capital punishment are "authoritarians."

The authors themselves would conclude that "authoritarians" may be found all along the political spectrum and that the simple absence of conscientious scruples against capital punishment is not evidence of "authoritarianism." The authors cited by the petitioner are only willing to designate a person as "authoritarian" after the most exhaustive tests specifically designed to measure attitudes, while the defense leaps to this conclusion almost willy-nilly.

If anything, the petitioner makes a case for revamping the jury system so as to provide for complete

psychological evaluation of all prospective jurors before the voir dire examination.

This Court is not the first to deal with this issue. In State v. Leland, 190 Ore. 598, 624-25, 227 P. 2d 785 (1951) aff'd. 343 U.S. 790 (1952) the defendant argued that qualified jurors will be more harsh and vindicative in the enforcement of laws and the punishment of crime. The court rejected the charge as an indictment of the People of Oregon, since it was by their will that capital punishment was authorized in Oregon, and held that one can be impartial even if he has no scruples against the death penalty. See Clarke v. Grimes, 223 Ga. 461, 156 S.E. 2d 91 (1967). In People v. Nicolaus, 65 Cal. 2d 866, 882, 423 P. 2d 787, 798 (1967) the defendant recognized the very substantial California precedents upholding the challenge for cause but asked for an overruling decision. The Court said, "Defendant contends that these cases should be overruled, complaining, in effect, that a death qualified jury does not constitute a jury of one's peers; that it cannot answer guilt —innocence questions as favorably to the defendant; that it cannot be impartial on the matter of punishment in the event of conviction; that it does not take into the jury room a pattern of attitudes characteristic of the community at large; that such a jury is authoritarian in nature and not disposed to humanitarianism. Such contentions are untenable, not only for the reasons stated in the foregoing cases, but specifically, were even one jury committed to a policy opposed to imposition of the death penalty in a proper case the rendition of justice in murder cases, as presently defined in our statutes on the subject, could be nullified." The court concluded with the obvious observation that such fundamental change rests in the legislative domain.

In Turberville v. United States, 303 F. 2d 411, 420 (1962) the Court considered the issue of impartiality and held that there was no proof that "persons not opposed to capital punishment are so bent in their hostility to criminals as to be incapable of rendering impartial verdicts on the law and the evidence in a capital case." Nor is there proof today that lack of opposition to the death penalty destroys a man's capacity to weigh evidence impartially. One would rather suspect that a man who had conscientious scruples, who probably will act in opposition to the dictates of law, is far more likely to lack the objectivity required of a fair juror.

The papers and studies upon which petitioner relies contradict each other. They are all based on small samples and Crosson doubts the validity of the Wilson and Goldberg subject groups. The jury differentials shown in the more extensive Goldberg study are relatively small and the Crosson data does not support petitioner's conclusions. The best petitioner could possibly do is show, and he has not so shown, that a jury not qualified to give the death penalty will convict somewhat less often that a qualified jury. In Fay the Court noted that "a system of exclusions could be so manipulated as to call a jury before which defendants would have so "little chance" of a decision on the evidence that it would constitute a denial of due process . . ." The studies offered by petitioner do not show that defendants have too "little chance" for a decision on the evidence. The petitioner's claim is nothing more than an argument, already rejected, that his trial procedure was improper merely because "some other could be devised which would give him a better chance of acquittal." Fay v. New York, 332 U.S. at 285.

The defendant clearly has not shown that the jury that tried him was not fair and impartial. Each of the jurors

who tried him testified at voir dire under examination by counsel for both parties that they could be fair and impartial. (Appendix A) Several of the jurors were first examined by defense counsel and tendered by defense counsel to the prosecution. This is hardly a "handpicked" jury. No limit was placed on the efforts of defense counsel to uncover bias or partiality. Many of the jurors were examined to the satisfaction of petitioner's counsel on issues such as presumption of innocence, the burden of proof beyond a reasonable doubt, the credibility of police officers, the fact of a prior conviction and their ability to return a verdict of not guilty. (Appendix A) None of these jurors were challenged for cause and petitioner did not exhaust his peremptory challenges. The sworn assertions of fairness must be accepted. "One may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain manner." Dennis v. United States, 339 U.S. 162, 170 (1950). If this was true in the far more aggravated facts of Dennis where government employees who could be discharged from their employment because of disloyal acts sat in judgment on a self-admitted Communist being tried for contempt of Congress in a time of high anti-communist sentiment, then it is indisputable in the instant case where all that is said to influence the jurors are some vague psychological tendencies whose existence is far from proven.

The petitioner claims also that the jury was not impartial on the issue of penalty. This issue was not raised in the proceedings below. It was not raised in the Petition For Certiorari. It is manifestly beyond the scope of

the Question Presented. The respondent therefore will not reply to this Argument unless directed to do so by the Court.

2. *The State has a valid interest in adopting a procedure whereby the jury decides the issue of guilt and punishment in a single trial and the vesting of discretion as to punishment in the jury does not obviate the need to exclude jurors with conscientious scruples against the death penalty.*

The petitioner advances an argument that the challenge for cause is unnecessary because the jury can reach a verdict of guilty without inflicting the death penalty, that the vesting of discretion in the jury as to penalty obviated the need for any qualification of jurors on the question of penalty. In State v. Reynolds, 43 N.J. 597, 602-03, 206 A. 2d 750, 753 (1965) the Court pointed out that the discretion vested by the Legislature in the jury was a discretion to be exercised on the basis of the evidence before it, not on the basis of pre-trial principles. In People v. Riser, 47 Cal. 2d 566, 575, 305 P. 2d 1, 7, (1956) it was said that the statute "calls for the exercise of legal discretion, not for the unswerving application of views formulated before trial that will compel a certain result no matter what the trial may reveal. There must be a meaningful choice . . . fundamentally based on the evidence and made during and not before deliberation on the verdict." Again nearly every court considering the question has made similar rulings.[12]

12.

ARIZONA:

Leigh v. Territory, 10 Ariz. 129, 138, 85 Pac. 948, 951-52 (1906)

The petitioner suggests that this Court should obviate the necessity of qualified jurors by requiring the States to adopt either judicial sentencing or bifurcated trial procedures. Of course the petitioner is asking this Court to become "a rule making organ for the promulgation of state rules of criminal procedure," which it is not. Spencer v. Texas, 385 U.S. 554, 564 (1967).

The Illinois procedure attacked by petitioner is a reasonable one which a state legislature could well decide

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ARKANSAS:
Needham v. State, 215 Ark. 935, 938-39, 224 S.W. 2d 785, 787 (1949)

FLORIDA:
Piccott v. State, 116 So. 2d 626, 628 (Sup. Ct. Fla. 1959)

IDAHO:
State v. Wilson, 41 Idaho 616, 243 Pac. 359 (1925)

INDIANA:
Gross v. State, 2 Ind. 329, 331 (1850)

KENTUCKY:
Jones v. Commonwealth, 14 Ky. L.J. 223, 19 S.W. 844 (1892)

LOUISIANA:
State v. Melvin, 11 La. Ann. 535 (1856)

MASSACHUSETTS:
Commonwealth v. Ladetto, 349 Mass. 237, 246, 207 N.E. 2d 536, 542 (1965)

MISSOURI:
State v. Wooley, 215 Mo. 620, 115 S.W. 417, (1908)

NEBRASKA:
Haddix v. State, 76 Neb. 369, 107 N.W. 781 (1906)

OKLAHOMA:
Hopkins v. State, 9 Okla. Crim. 104, 109-11, 130 Pac. 1101, 1103-04 (1913)

OREGON:
State v. Leland, 190 Ore. 598, 625, 227 P. 2d 785, 797 (1951)

TEXAS:
Caldwell v. State, 41 Texas 86, 93 (1874)

WEST VIRGINIA:
State v. Greer, 22 W.Va. 800, 809 (1833)

WYOMING:
State v. Aragon, 41 Wyo. 308 317, 285 Pac. 803, 806 (1930)

was fairer to defendants in capital cases than other procedures.

The petitioner cites the example of the bifurcated trial used most commonly in California. In California the bifurcated trial consists of a guilt and a penalty phase heard by the same jury. It is not commonly understood that two juries are not impanelled. See People v. Smith, 63 Cal. 2d 779, 789, 409 P. 2d 222, 229 (1966). Further, the bifurcated trial procedure, which allows a full scope of evidence in aggravation, has resulted in a far more frequent infliction of the death penalty than occurred under the older procedures. Indeed in this respect petitioner is far better off under the Illinois procedure where he has, in effect, the right to introduce evidence in mitigation. (People v. Crump, 5 Ill. 2d 251, 258, 125 N.E. 2d 615, 619 (1955); People v. Mangano, 375 Ill. 72, 77, 30 N.E. 2d 428, 430 [1940]) while the State cannot introduce evidence which is relevant only in aggravation. (This was admitted by petitioner in his brief before the Illinois Supreme Court on direct appeal Defendant's Br., No. 36277, p. 25).

Even if a two-jury system or judicial sentencing were adopted the jurors would still, to a large extent, have to be qualified for the death penalty. A juror with conscientious scruples against inflicting the death penalty could not, consistent with his scruples, sign a verdict of guilty knowing that, on the basis of that verdict, a judge or another jury might send a man to his death. See United States v. Wilson, 28 Fed. Cas. 699, 701, No. 16, 730 (C.C. Penn. 1830); Pierce v. State, 13 N.H. 536, 556 (1843). In People v. Ray, 252 A.C.A. 1002, 61 Cal. Rep. 1, 13 (1967) the Court noted that "the exclusion is warranted because the state of mind evidenced by conscientious objection to the death penalty does in fact pervade the trial

on the issue of guilt whenever that penalty may be imposed. So long as it is known that the offense may be so punished, this influence may be felt even though another jury or the court were to determine the actual sentence." The Indiana Supreme Court echoed the same point in Perkins v. State, 207 Ind. 119, 122, 191 N.E. 136, 137 (1934) where it was the duty of the trial court to fix penalty: "If they [the jurors] had [scruples], and knowing that the court might inflict the death penalty, they might refuse to return a verdict of guilty even though the evidence and the law might justify it." In short, "It is impossible to separate the verdict from its consequence, the punishment." People v. Tanner, 2 Cal. 257, 259 (1852) Surely a juror unalterably opposed to capital punishment and unable to return a death verdict would have difficulty fairly weighing alternatives, one of which could later result in a death penalty, when he could simply force a mistrial, an acquittal or a conviction of a lesser included offense and thereby prevent imposition of the death penalty.[13] See People v. Carpenter, 13 Ill. 2d 470, 476, 150 N.E. 2d 100, 103 (1958) (Challenge allowed for jurors sitting on a trial to determine mental competency to be executed.)

The policy of having the judge decide the penalty may be undesirable because it totally eliminates any community participation in setting the death penalty, and it is doubtful that this procedure would benefit defendants. See Bell v. Patterson, — F. Supp. —, 2 Crim. L. Rptr. 2426 (D. Colo. 1968). We need only note how rarely a

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13. The suggestion that a second jury be impanelled is somewhat insincere in light of the fact that petitioner goes beyond the scope of the litigation to insist that a qualified jury is not impartial on the issue of punishment.

jury is waived in a case where the state seeks the death penalty. And, of course, the defendant has the protection of the requirement of unanimity of twelve jurors on the issue of punishment.

The policy of having only one jury to decide the issue of guilt and punishment has great merit especially in light of the fact that the only real issue at most capital trials is the issue of punishment.[14] The evidence of guilt is extremely relevant to the issue of punishment. The single jury which hears it at a contested trial may be influenced to recommend mercy by the evidence. A second jury would not hear the evidence of guilt, or if they did, they would not hear it vigorously contested by a defendant who stands proven guilty beyond a reasonable doubt and no longer can assert his innocence. Finally there can be no shifting of responsibility in a single jury procedure. The second jury may well lose hesitancy to fix the death penalty since they can put the heaviest responsibility on the first jury and the first jury can do the same thing on the issue of guilt. Certainly the full scope of aggravation evidence admissible at a separate penalty trial has not substantially aided the tactical position of defense counsel in California.

What is incomprehensible to us about petitioner's argument is that each of these procedures is far more beneficial to petitioner than the older procedures which made the death penalty mandatory upon conviction. No constitutional challenge could be made to such a procedure.

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14. This procedure may operate as did the Illinois procedure, at the time of petitioner's trial where the jury determination of punishment is final. Or it may operate as the Illinois procedure today with discretion in the trial court to disregard the recommendation of the death penalty and discretion in the reviewing court to reduce sentence.

Williams v. New York, 337 U.S. 241, 252 (1948). No one can seriously dispute the necessity of having a jury free of conscientious scruples against the death penalty in such a case. (See Petr's. Brief, p. 37, p. 39, fn. 1). Yet when the mandatory death penalty is amended to the benefit of defendants in capital cases, it is said that now the state is unfair.

The point of all this is not that any of these various procedures is the best or that bifurcated trials and judicial sentencing are improper. There are good reasons for adopting each procedure.[15] Each procedure has benefits for and effects on the defendant that are not present in the other procedures. The procedures are not identical in their effect on individual defendants. Where there are such differences, the policy decision of each individual state to adopt one or another should be sustained. See Johnson v. Commonwealth, — Va. —, 158 S.E. 2d 725, 730-31 (1968). In Spencer v. Texas, 385 U.S. 554, 560 (1967) this court noted that the states have always been given great leeway in dividing responsibility between judge and jury in criminal cases. The Court then sustained a Texas procedure whereby the jury was given evidence of prior convictions in order to sustain an habitual criminal count in an indictment. This was Texas practice even when the defendant

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15. Today thirty-four states, the District of Columbia and eight federal statutes give the jury discretion to impose a sentence of death binding upon the court. Five states provide for a separate penalty trial before the jury that decides the guilt of defendant. Four states provide for a mandatory death penalty in certain cases. Three states and two federal statutes give discretion to the jury but allow the court to give a lesser sentence if the jury recommends death. One state allows the court to pronounce sentence of death even when the jury recommends a lesser sentence. One state provides for judicial sentence of death without jury participation in certain cases. See Appendix B

offered to stipulate to the convictions. Certainly the present case presents a procedure with far stronger policy justification and far stronger state interest than was found in Spencer. The doctrines in Spencer apply *a fortiori* to the present case.

Finally, we note that the petitioner has never established the essential point that the Illinois procedure does not give him a fair and impartial jury. The possibility of alternative procedures can scarcely arise in this context.

3. *The methods and assumptions underlying petitioner's argument are inconsistent with the duty of jurors to follow the law and return a verdict according to the evidence, with the entire system of challenges for cause pervading the selection of American juries, with the voir dire method of selecting juries and with the clear constitutionality of general jury qualification statutes found in all the states.*

The petitioner's argument, and, in particular, his method of challenging settled law will, if accepted, present a serious challenge to the legal process, a challenge that goes beyond the scope of capital cases and indeed, beyond the scope of criminal cases.

The assumption implicit in the petitioner's argument[16] is that he has a right to have a jury composed of persons who will or are likely to nullify and disregard the law and the evidence. Yet "a verdict on the evidence . . . is all an accused can claim, he is not entitled to a set-up that will give a chance to escape after he is properly proven guilty." Fay v. New York, 332 U.S. at 288-89. It is true that the jury has the power to disregard the law and the evidence but it is not their right to do and it is not the

16. And made explicit in Petitioner Bumper's brief.

petitioner's right to have them do so. Petitioner has not contested his guilt in any appeal.

Jurors serve as finders of fact, they are bound by law, by rulings on evidence and instructions. They are, in the vast majority of American states, not judges of law. The function of the jury is to weigh the evidence and return a verdict consistent with the evidence and the law. The jury has the right to nullify law only when it serves as judge of the law as it did in England in cases of criminal libel. See Pierce v. State, 13 N.H. 536.

A single juror can effectively nullify the law for under prevailing procedure (including Illinois) neither a verdict of guilty nor a punishment of death can be returned without the concurrence of all twelve jurors. See Andres v. United States, 333 U.S. 740, 766 (1948) (concurring opinion).

The variety of disqualifications of veniremen who will not follow the instructions of the court or who are biased against a particular law is quite impressive.

The prosecution, and sometimes, the defense are entitled to exclude from jury service those who will not convict on circumstantial evidence,[17] those with bias against gambling laws,[18] prohibition laws,[19] abortion laws, statutory rape laws.[20] The prosecution is entitled to exclude

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17. Commonwealth v. Shushinskie, 242 Pa. 406, 413, 89 Atl. 564, 566 (1913); Smith v. State, 55 Ala. 1. (1876) See Hardy v. United States, 186 U.S. 224 (1902).

18. Smith v. United States, 112 F. 2d 217, 218-19 (D.C. Cir. 1940). (Numbers player disqualified from sitting in trial of numbers operator.)

19. McClure v. State, 103 Tex. Crim. 158, 280 S.W. 784 (1926); Stremler v. State, 15 Ala. App. 600, 601, 74 So. 727, 728 (1917).

20. State v. Normingdale, 154 La. 523, 526, 97 So. 798, 799 (1923).

veniremen who would give no weight to the testimony of an informer or accomplice.[21]

There is also a disqualification of jurors who will not abide by the felony murder rule[22] or who will not convict an accomplice of murder when the accomplice did not do the killing.[23] A venireman who believes that polygamy is divinely commanded is not qualified to sit in a bigamy trial.[24] A more recent example is the increasing public disapproval of certain narcotics laws.

The juror who will give weight to a legally irrelevant fact is not qualified to serve as a juror, e.g. the age of the victim in a statutory rape case,[25] the age of the defendant[26] or the sex of the defendant.[27] Presumably a juror whose code of honor demands that death avenge an insult is not fit to serve in a case where one man kills another over an insult just as a juror who thinks the killing of an unfaithful wife or lover is justified.[28]

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21. State v. Flint, 60 Vt. 304, 315, 14 Atl. 178, 184 (1888).

22. State v. Bunk, 4 N.J. 461, 468, 73 A. 2d 249, 253 (1950); People v. Wolff, 182 Cal. 728, 736, 190 Pac. 22, 25-26 (1920); Part v. State, 112 So. 2d 380, 382-83, (Sup. Ct. Fla. 1959).

23. Commonwealth v. Bentley, 287 Pa. 539, 554, 135 Atl. 310, 312 (1926).

24. Miles v. United States, 103 U.S. 304, 310 (1880); Reynolds v. United States, 98 U.S. 145, 157 (1878).

25. State v. Pettit, 33 Idaho 326, 332-33, 193 Pac. 1015, 1017 (1920).

26. State v. Hunter, 183 Wash. 143, 152-53, 48 P. 2d 262, 267 (1935).

27. Ray v. People, 63 Colo. 376, 378-79, 167 Pac. 954, 955 (1917).

28. Jones v. People, 23 Colo. 276, 279, 47 Pac. 275, 276 (1896); People v. Decker, 157 N.Y. 186, 192, 51 N.E. 1018, 1020 (1898).

A juror who believes the punishment prescribed by law is too severe is also unqualified to serve[29] as is a juror with scruples against a penitentiary sentence in a felony case.[30] And of course a juror who believes that God, and not man, should punish is not a fit juror.[31]

Surely the petitioner could prove that persons with scruples and beliefs against particular laws will be less likely to convict than persons who are not opposed to such laws. The defendant against whom the primary witness is an informer or accomplice is tried before a jury from whom all who would disregard the testimony out of principle are excluded. A man who kills another for an insult is tried before a jury without a single juror who believes as he does. And what of the abortionist and the gambler. Surely many Americans are antipathetic to laws restricting gambling and abortion. And in past times what of the bootlegger in the prohibition era or the Mormon polygamist in Utah in the late 1800's. In all of these cases the defendant could avail himself of petitioner's argument.

The defendant, too, has his challenges for cause. A juror who will not exercise his discretion to give the defendant the benefit of a suspended sentence statute is disqualified.[32] The juror who declares that all abortions are

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29. Carr v. State, 91 Okla. Crim. 94, 99, 216 P. 2d 333, 336 (1950); State v. Curtis, 108 Kan. 537, 540, 196 Pac. 445, 446 (1921); State v. Taylor, 323 Mo. 15, 26, 18 S.W. 2d 474, 478 (1929).

30. Stalls v. State, 28 Ala. 25, 27 (1856).

31. Green v. State, 147 Tenn. 299, 312-13, 247 S.W. 84, 88 (1923).

32. Fernandez v. State, 82 Tex. Crim. 129, 198 S.W. 301 (1917).

always wrong is not fit to serve in an abortion prosecution.[33] Strong prejudice against narcotics offenders is a challenge for cause especially in entrapment cases.

The venireman who gives weight to irrelevant factors is also disqualified, i.e. the juror who would be inclined to give more weight to the testimony of a police officer merely because he is a police officer,[34] or the venireman who would convict more readily if the victim were a police officer.[35]

In income tax evasion cases involving gamblers prejudice against those who accept wagers or religious scruples against gambling is a ground for disqualification.[36] Prejudice or scruples against the insanity defense justifies a challenge for cause,[37] as does prejudice against the defense of self defense.[38]

Where the jury decides the validity of a consent search, a venireman who has a notion of a consent search less favorable to the defendant than the law's notion it is error not to sustain the defendant's challenge.[39]

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33. People v. Murawski, 2 Ill. 2d 143, 147, 117 N.E. 2d 88, 90 (1954).

34. Sellers v. United States, 271 F. 2d 475, (D.C. Cir. 1959).

35. Salazar v. State, 149 Tex. Crim. 260, 262, 193 S.W. 2d 211, 212 (1946).

36. United States v. Clancy, 276 F. 2d 617, 632 (7th Cir. 1960); Lurding v. United States, 179 F. 2d 419, 421 (6th Cir. 1950).

37. Jones v. State, 60 Tex. Crim. 139, 142, 131 S. W. 572, 573 (1910); Territory v. Lum Dim, 23 Haw. 792 (1917).

38. Webb v. Commonwealth, 314 S.W. 2d 543 (Ky. 1958); People v. Bennett, 79 Cal. App. 76, 88, 249 Pac. 20, 25 (1926); Meador v. State, 94 Tex. Crim. 608, 611, 253 S.W. 297, 299 (1923).

39. Fisher v. State, 37 Okla. Crim. 393, 259 Pac. 153, (1927).

The only reason for these challenges is the fear that the juror will not follow the law and the evidence. The rationale behind the best known defense challenge is that because of television and newspaper publicity a juror will not base his verdict on the law and the evidence.[40] The veniremen challenged by the defense would probab be more likely to convict than acquit yet the state could hardly claim that this was a reason for keeping them on the jury. If the defendant is entitled to disqualify jurors who are likely to base their decision on something other than law and the evidence why is the state not so entitled?

The realm of civil trials is not unaffected by petitioner's argument. Prejudice or bias against a statute of limitations defense,[41] against suits brought by non residents,[42] against damage actions for back injuries[43] and against personal injury-negligence suits in general[44] all serve to disqualify civil jurors. In a civil suit a juror must follow the court's instructions on the last clear chance doctrine.[45] A juror who could not award child cus-

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40. We would note that in a case of great publicity the numbers of jurors excused for cause due to partiality will far exceed the number excused for scruples in a capital trial.

41. Towl v. Bradley, 108 Mich. 409, 66 N.W. 347 (1896).

42. Naylor v. Metropolitan St. Ry. Co., 66 Kan. 407, 71 Pac. 835, (1903).

43. Leibman v. Curtis, 138 Cal. App. 2d 222, 223-25, 291 P. 2d 542, 544 (1955).

44. Galveston, H & S.A. Ry. Co. v. Manns, 37 Tex. Civ. 356, 357, 84 S.W. 254, 255 (1904); Jacobson v. Julian, 246 Md. 549, 554, 229 A. 2d 108, 112 (1967).

45. Kramm v. Stockton Electric R. Co., 22 Cal. App. 737, 746, 136 Pac. 523, 528 (1913).

tody to a woman who drinks [46] is not a fit juror in a custody case nor is a juror with religious scruples against divorce a fit juror in a divorce case.[47] See Littell v. Bi-State Transit Development Agency, 423 S.W. 2d 34, 36-38 (Mo. App. 1967).

Jurors views on damages in a civil case, like those on penalty in a criminal case, are the bases of disqualification either where the juror would not award what the law allows [48] or would require extra proof [49] or would always give a "bonus".[50]

The juror who believes in absolute liability for railroads is not a fit juror where the railroad is a defendant.[51] In an area where there is widespread disagreement among the citizenry about the philosophy of a dram shop act a plaintiff must be allowed to determine if a venireman has any prejudice against dram shop actions.[52]

In all of these civil actions the party complaining about the disqualification could probably produce evidence if he could afford a survey that the excluded juror was more

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46. Flowers v. Flowers, —— Tex. Civ. ——, 397 S.W. 2d 121, 123 (1965).

47. Smith v. Smith, 7 Cal. App. 2d 271, 273, 46 P. 2d 232, 233 (1935).

48. Bunda v. Hardwick, 376 Mich. 640, 660-63, 138 N.W. 2d 305, 311-14 (1966).

49. Snyder v. General Electric Company, 47 Wash. 2d 60, 66, 287 P. 2d 108, 112 (1955).

50. Kentucky Utilities Co. v. Jett, 391 S.W. 2d 677, 678 (Ky. 1965).

51. Ruby v. Chicago, M. & St. P. Ry. Co., 150 Iowa 128, 131, 129 N.W. 817, 818 (1911).

52. Schnieder v. Kirk, 83 Ill. App. 2d 170, 176, 226 N.E. 2d 655, 658 (1967).

likely to bring in a verdict favorable to him and that, if disagreement with a given law, like the dram shop act, was widespread, he was tried by a nonrepresentative jury of persons unsympathetic to him. In fact, such argument was made in part in Grossfield v. Braverman, 203 Md. 498, 502, 101 A. 2d 824, 826 (1954). In that case the trial court excused a veniremen who displayed prejudice toward the law which permitted a sister to recover damages, under proper circumstances, from her brother because of injuries sustained in an automobile accident. The defendant (presumably an insurance company) protested that the elimination of such veniremen deprived the defendant of the very jurors who were most suspicious of collusion in cases like this and prejudiced the defendant's attempt to convince the jury of collusion. The Court held that the law permits these family actions and that the plaintiff is entitled to a jury that has no preconceived notion disfavoring them. It deemed the presumption that those who did not object to such suits would not be convinced of collusion by proper evidence to be a *non-sequitur*.

The petitioner seeks to overturn one aspect of this rather extensive structure of challenges for cause by means of opinion polls and psychological studies. If the attack is sustained as to one area, it may well prevail against all.

Of equal significance is the fact that opinion polls and psychological studies are the vehicles which petitioner wishes to substitute for the classic voir dire method of determining jury qualification. Voir dire examination is based on the belief that a man's straightforward answer can usually be taken at face value except in the most ex-

traordinary situations.[53] Psychological theory, or at least some theories, do not accept this. Voir dire procedure deals with direct questions, a juror is asked if he has bias, prejudice, scruples or opinions relating to the specific issues and case before the jury. Psychological testing deals with the indirect question unrelated to the specific case. The petitioner must claim that the techniques of psychological testing should be substituted for or added to the method of voir dire. This is, in fact, what petitioner has done.

But the petitioner cannot stop here. If the voir dire is inadequate to test fairness and impartiality in the present case it surely is not adequate in other cases. Perhaps the end result will be that veniremen in Cook County will take a battery of psychological tests the results of which shall be given to counsel in each case. Yet this might not be adequate for the psychologists who studied the authoritarian personality would not even rely on their questionnaires but insisted on a clinical evaluation of each of their subjects. If that seems far fetched how about allowing counsel to ask questions like those usually found on verbal psychological tests. This at least has been tried, but disapproved. Commonwealth v. McGrew, 375 Pa. 518, 524-25; 100 A. 2d 467, 469-70 (1953). Of course a psychologist would have to be present in court to interpret the answers to such questions. And even if this is thought to go too far what about permitting a close inquiry on voir dire with respect to the juror's salary, attitude toward his work, religious beliefs, and political preferences. All of those matters are significant psychologically but unless there is some close relation between them and an issue in

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53. Compare Irwin v. Dowd, 366 U.S. 717, 722-24 with Beck v. Washington, 369 U.S. 541, 555-58 and Dennis v. United States, 339 U.S. 162, 169-71.

the case, i.e., religious prejudice toward defendant or complaining witness, the courts will not allow them to be asked. Certainly the existence of conscientious scruples against capital punishment does not reveal enough one way or the other about a man's personality to allow a judgment. Even the advocates of the authoritarian personality theory do not go so far. And if scruples are such a crucial factor affecting all men's judgments then questions concerning them should be asked in every case and not forbidden as they are in non-capital cases. See Hemphill v. Commonwealth, 405 S.W. 2d 956 (Ky. 1965). These are the inevitable results of the fact that the method of proof used by the petitioner extends its inquiry beyond the subjects and issues of a given litigation. And this is antithetical to the concept of voir dire in all criminal and civil trials. Does not petitioner seek what was condemned in these words: "Such minuteness of inquiry into the secret springs of emotion, sentiment and moral . . . action . . . would not only tend to unduly annoy and oppress candid, conscientious and intelligent citizens but also to exclude them from jury service." Funk v. United States, 16 App. D.C. 478, 489 (1900).

The petitioner's argument will be seen to affect federal civil rights prosecutions in which the federal government has sought to disqualify veniremen on the basis of their membership in organizations opposed to civil rights laws and decisions. Now it is true that someone subscribing to the principles of the Ku Klux Klan oath could possibly give the government a fair trial. Just as a juror with conscientious scruples might possibly be able to give the state a fair trial but in both cases there is a "rational foundation" for excluding the juror. To sustain a challenge for cause neither prosecution nor defense must prove beyond a reasonable doubt that the juror's decision will be affected, a reasonable probability is enough. In the civil rights pros-

ecutions virtually all such excluded veniremen will be white and the defendants will be white. In the civil rights prosecutions the level of exclusion in some areas of this country could reach well beyond that found in capital cases on the issue of penalty scruples. And finally it will surprise no one if a survey were to prove that jurors not opposed to the civil rights laws were more prone to convict in civil rights prosecutions than jurors who were opposed. In short, the issue in civil rights prosecutions is the same as the issue in capital cases: is the defendant entitled to have on his jury men who are likely to nullify the law, to disregard the evidence and the law, because a large segment of community sentiment disapproves the law? The answer in both cases is no.[54]

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54. E.g. In State v. Wilkins (No. 155, Second Judicial Circuit of Alabama) the prosecution was denied challenges for cause on the basis of Klan membership when the defendant was being tried for the murder of a civil rights worker, Mrs. Viola Liuzzo. Further, Richmond Flowers, the prosecutor, asked jurors what they thought of a person who worked for negroes' civil rights. Each juror gave his opinion that such a person was "inferior". Mr. Flowers argued that these jurors displayed an outlook that would regard the killing of a civil rights worker as less serious than other intentional killings which view was contrary to Alabama law. The trial judge, improperly in our view, denied each challenge for cause. Naturally, the prosecution failed and the law was not enforced.

In United States v. Price, et al. (S.D. Miss. Crim. No. 5291) the defendants were charged with civil rights violations arising from the murder of three civil rights workers, Schwerner, Chaney and Goodman. During the voir dire the government asked jurors about their affiliations with the Klan and other hate groups. Then the Klan oath was read to these jurors and the jurors were asked if they believed in or subscribed to the principles contained in the Klan oath. Those who answered yes, were challenged for cause. The trial judge, properly in our view, allowed such challenges. The prosecution was successful and the law prevailed.

It is difficult to see how the jury qualification and exemption statutes common to every state could survive an attack similar to that used by petitioner here. These statutes [55] achieve a de jure or de facto exclusion of persons under 21 or 25 years and over 65 or 70 years of age, non-taxpayers, unregistered voters, felons, aliens, women, doctors, lawyers, clergymen, school teachers, newspapermen, policemen and firemen. Hardship exemptions are also granted and these operate to exclude many of those with the lowest incomes. No one would have doubted, until now, the validity of these exclusions. They are based on a rational foundation, that is, most of the persons disqualified would not make competent jurors, most of the persons exempted will render a greater service to the community by pursuing their occupations. This is not necessarily true of every member of the class but it is true of a large number of them and this is sufficient to establish a "rational foundation." In these cases, it would be immaterial if the disqualification and exemption statutes resulted in juries more likely to convict than hypothetical juries containing members of the excluded classes. Indeed, the exclusions may actually have this result, at

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55. E.g. Cal Code of Civil Procedure, Secs. 198-200 (1967).
Illinois Revised Statutes, 1967, Ch. 78, Sec. 2, 4, Ch. 91, Sec. 69.
Mass. Gen. Laws, Ch. 234, Secs. 1-2 (1956).
Mich. Comp. Laws, Sec. 691.1021-22 (1967).
New York, Judiciary Law, Secs. 507, 596, 598-99, 665-65a (Supp. 1967).
Pennsylvania Statutes, Tit. 17, Sec. 1279, 1322, 1333 (1962).
Texas Code of Criminal Procedure, Art. 35.16 (1966) and General Statutes, Art. 2133-35 (1964).
See also 3 Blackstone, Commentaries 361-65;
4 Blackstone, Commentaries 346;
1 Coke, Institutes 156-57.

least in particular cases. Zeisel's unpublished study, cited by petitioner below, "Some Insights Into The Operation of Criminal Juries (University of Chicago, 1957), indicated substantial differences in prosecution and defense "proneness" among women, high income and high age groups and low education groups. Zeisel, pp. 29-31.

Jurors who are aliens might deal more sympathetically with alien defendants than would jurors who are citizens. Minors might forgive more readily than their elders the peccadilloes of a youthful defendant who subscribes to the tenet: "Never trust anybody over thirty." A convicted felon might heed more readily than the law-abiding citizen the Biblical injunction: "Judge not, that ye be not judged." A lawyer-juryman might be a godsend to a defendant relying on a complex technical defense. And a clergyman or nun might well show a good deal more compassion than would an ordinary juror. In Fay v. New York, 332 U.S. at 292, the Court noted that under petitioner's theory a policeman might never get a fair jury. Nor would a fireman, a doctor or a lawyer. Surely the jury qualification statutes must fall if judged by petitioner's standards.

CONCLUSION

The petitioner was tried by a representative jury selected from the community in which he committed his capital offense. Measured by any of the tested legal standards and the overwhelming evidence presented to it, this jury was undeniably fair and impartial in both its conclusions as to guilt and punishment.

What in reality has been presented to the Court is an insubstantial attack upon what the petitioner charaeter-

izes as "the State's increasingly questionable and unpopular interest in obtaining the death penalty." However attractive the petitioner's thinly disguised assault upon a State's appropriate legislative decision to provide for a death sentence. it is without constitutional merit both historically and practically. For this Court to adopt a "popular" sentiment test as a significant factor in the determination of constitutional question, would be to lessen the judicial force and reasoning buttressing many of this Court's recent pronouncements concerning the criminal process. One cannot but wonder how many of our individual constitutional rights would survive the "popularity" test. It may be emotionally appealing, but is legally improper to think of and treat capital cases as *sui generis*. The issue of capital punishment and the manner of its imposition has a proper forum and such a forum is the appropriate legislative body. The nullification of law is a policy decision which rests with the People acting through their elected representatives and not with the individual citizen acting as a juryman.

The judicial sanctioning of the application of public opinion polls and psychological questionnaires could not be limited to capital cases. The wake of such a decision on jury qualification would engulf all "unpopular" legislation such as civil rights, drug control and taxation. If reliance is placed upon psychological questionnaires or testimony virtually no challenge for cause could survive. If the voir dire examination is not sufficient to assure fairness in capital cases, it surely is not sufficient to provide this protection in any other case. In every case veniremen will be compelled to answer "attitude revealing" questions. The voir dire conducted in the petitioner's trial assured and provided him of a fair and just verdict. He truly only

questions his punishment not his adjudication of guilt. Understandably this is his concern—and that of the community which suffered his offense. But the penalty and its manner of determination in no way can be elevated to the status of a constitutional violation. The judgment of the jury should be affirmed.

Respectfully submitted,

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APPENDIX A.

The Voir Dire Examination Of The Twelve Jurors Selected To Try Petitioner.

R 705 BLANCHE CARLSON, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Cernek.

Q. Will the lady next to Mrs. Formanek give me your name, madam?

A. Blanche Carlson.

Q. Is that Miss or Mrs.?

A. Mrs.

Q. Mrs. Carlson, where do you live?

R 706 A. 5400 S. Avers.

Q. And with whom do you live at that address?

A. My husband.

Q. What type of work does he do?

A. Assistant traffic manager.

Q. Where?

A. Glaser Crandell.

Q. What type of work is that?

A. Oh, you know, all different rates.

Q. He works downtown?

A. No. They're on 20th and Western.

Q. And are you employed?

A. The same place.

Q. And what do you do?

A. Machine operator.

Q. How long have you lived at 5400 S. Avers?

A. Four years.

Q. Before that, where did you live?

A. 727 California Terrace.

Q. Where is California Terrace?

A. That's right off of Clark, Clark Street around Belmont and in through there.

Q. Do you have any brothers or sisters?

A. I've got three brothers and two sisters.

R 707 Q. What do your brothers do?

A. One's a truck driver.

Q. Who does he work for?

A. Central-Wisconsin.

Q. And the other brother?

A. One works in the stockroom.

Q. For whom?

A. Bloomfield.

Q. Where are they?

A. 47th and Cicero.

Q. And the other brother?

A. He's a riveter.

Q. And you say you have a sister?

A. Two sisters.

Q. What do they do?

A. One works at the same place I do.

Q. The husbands?

A. They're both widows.

Q. What type of work do they do?

A. Factory work.

Q. Your father. What type of work?

A. My father's deceased.

Q. What type of work did he do?

A. He used to work for the city.

R 708 Q. In what capacity?

A. In the alleys, cleaning. I don't know what you call that.

Q. Do you have any relatives or friends who are policemen?

A. No.

Q. Is this your first day in the building?

A. Yes, sir.

Q. Did you hear the questions that I asked of Mrs. Heimann here a short time ago?

A. Yes, sir.

Q. If I asked you those same questions, would your answers be substantially the same?

A. Yes, sir.

Q. Do you think you could give the State and the defendant here a fair trial?

A. Yes, I do.

Q. You'd like to sit on this jury and hear the evidence?

A. I think I would.

Q. Have you or any member of your family ever been the victim of a criminal offense?

A. No, I haven't.

Q. You have never been in court before, is that right?

A. No.

R 720 Blanche Carlson, was examined as follows:

Examination by Mr. Kissane.

Q. Mrs. Carlson, do you spell Carlson with an "o" or an "e"?

A. C-a-r-l-s-o-n.

Q. That's the way I wrote it. Now, in addition to living at 5400 S. Avers, have you lived in and
R 721 around Chicago all your life?

A. Yes, sir.

Q. Did you attend school here?

A. Yes, I did.

Q. What schools did you attend?

A. John Spry School. Grammar school, that's all.

Q. Is that on the south side?

A. Right here on 24th and Marshall Boulevard.

Q. Now, prior to your marriage, what was your name?

A. Roth, R-o-t-h.

Q. Have you ever heard of this case before?

A. No.

Q. Do you know anyone at the table, any of the lawyers?

A. No.

Q. Or the defendant?

A. No.

Q. Do you recognize any of the names of the witnesses that were read?

A. No.

Q. And you have never been in a courtroom prior to today?

A. No.

Q. Do any of the questions asked of any of the
R 722 preceding ladies and gentlemen bring anything to your mind, Mrs. Carlson, that would cause you to feel you cannot be a fair and impartial juror?

A. No.

Q. Do you have a conscientious or religious scruple against the infliction of the death penalty in a proper case?

A. No.

Q. Now, if you're selected as one of the twelve jurors, will you base your verdict solely on the evidance as it is testified to on the witness stand?

A. Yes, sir.

Q. And the rules of law as given by his Honor Judge Salter?

A. Yes, sir.

Q. You won't bring into your deliberations of the jurors something from outside of this courtroom, is that correct?

A. That's correct.

Q. And if that was your thought, you'd tell us now, isn't that so?

A. Yes, I would.

Q. If you're selected as one of the twelve jurors and it should be your opinion, along with the other ju-
R 723 rors after you heard all the testimony on the witness stand and the rules of law given by his Honor and

you're back in the jury room deliberating on the verdict and you find that the defendant Witherspoon is guilty of killing Officer Mitchell Stone and that the proper verdict in this case, based on the law and the evidence, is death in the chair, would you so say by signing a guilty verdict?

A. Yes, I would.

R 724 CECELIA LOHMEIER, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Kissane.

Q. The lady who just moved into the panel. Your name, please?

A. Cecelia Lohmeier, L-o-h-m-e-i-e-r.

Q. You pronounce the name Lohmeier?

A. Yes, sir.

THE COURT: Speak a little louder. This man has to write it all down and he's not joking about being hard of hearing. He actually is a little hard of hearing, so speak up.

MR. KISSANE: Q. Your home address, please?

A. 4940 West Kinzie Street.

Q. How long have you lived at that address?

A. 14 years.

R 725 Do you have a conscientious or a religious scruple against the infliction of the death penalty in a proper case?

A. No, sir.

Q. Now, with whom do you reside at 4940 West Kinzie?

A. With my husband and two sons and my husband's aunt.

Q. Could you talk a little louder, please?

A. It's my husband's aunt, two sons and my husband.

Q. What's the nature of your husband's employment?

A. He's a CTA driver.

Q. In general, how long has that been his employment?

A. Abaut 15 years.

Q. Are you gainfully employed?

A. Part time.

Q. What is the nature of your employment?

A. I work part time in a pastry shop.

Q. Where's that located?

A. On 174 North Cicero.

Q. Right close to your home?

A. That's right.

Q. Now, your two boys are going to school, are
R 726 they?

A. Yes, sir.

Q. And what school are they attending?

A. At the Navy Pier. The University of Illinois.

Q. Both boys are going to the University of Illinois?

A. Yes.

Q. Are they both following the same type of studies?

A. That's right.

Q. And what would that be?

A. Accounting.

Q. Have you yourself lived in and around Chicago all your life?

A. No, I haven't.

Q. Prior to coming to this area, where did you reside?

A. In Wisconsin. Oshkosh.

Q. And you attended schools up in Oshkosh?

A. That's right.

Q. What schools did you attend?

A. Sacred Heart Catholic School and Oshkosh Public High School.

Q. Prior to your marriage, what was your name?

R 727 A. Kallous, K-a-l-l-o-u-s.

Q. Now, did any of the questions asked of any of the preceding ladies and gentlemen bring anything to your mind that indicated to you you cannot be a fair and impartial juror?

A. No.

Q. You understand the charge in this indictment is that of murder, do you?

A. That's right.

Q. You understand the charge is that on the particular date named the defendant Witherspoon killed a police officer by the name of Mitchell Stone, do you?

A. That's right.

Q. Now, do you understand, as a juror, that the only thing you're to consider, as to what the facts are, is what you hear testified to under oath?

A. Yes, sir.

Q. And, similarly, as to the rules of law you're to follow, do you understand the rule of law you're to follow is the rule of law as given by his Honor, Judge Salter?

A. Yes, sir.

Q. Now, you wouldn't bring into your deliberations as a juror something that transpired outside the
R 728 courtroom, is that correct?

A. No.

Q. Now, if you're selected as one of the twelve jurors, after having heard all the evidence and the rules of law as given by his Honor, and you're back in the jury room, and it should be your opinion, along with the other eleven, that the defendant Witherspoon is guilty of the murder of Officer Stone, and the proper penalty, under the law and the facts in this case, is that of death in the chair, would you so say by signing a guilty verdict and fixing death in the chair as the penalty?

A. Yes.

Q. And you will not let sympathy or prejudice affect your service here as a juror, is that correct?

A. That's right.

R 739 VICTORIA BLAHA, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Kissane.

Q. The lady who moved into the back seat. Your name, please?

A. Victoria Blaha.

R 740 Q. Your home address, please?

A. 4319 West Monroe.

R 747 Q. Miss Blaha, how long have you lived at 4319 West Monroe Street?

A. Twelve years.

Q. With whom do you reside at that address?

A. I'm alone since January 1st.

Q. Have you lived in and around Chicago all your life?

A. Yes, I have.

Q. You lived on the west side all your life?

A. That's correct.

Q. Did you attend schools there?

A. Yes.

Q. What schools did you attend?

A. Tilden Public and Austin High.

Q. Are you gainfully employed?

A. I'm gainfully employed at the present time, yes.

Q. What's the nature of your employment?

A. Claim Department for an insurance company.

THE COURT: You jurors on the last two rows may come up and occupy this section (indicating) so you will be a little closer.

R 748 All right, proceed, counsel.

MR. KISSANE: Yes, sir.

Q. What is the name of the company that you are employed by?

A. Travelers Insurance Company.

Q. How long have you worked for Travelers?

A. 34 years.

Q. Now, do you have other members of your family living in and around Chicago?

A. Yes. I have a brother working for the Commonwealth Edison Company.

Q. And, in general, has that been his employment, his work life?

A. For 34 years.

Q. Do you understand that the charge in this indictment is murder? Do you?

A. Yes, I do.

Q. And Mr. Cernek has told you that the charge involved the defendant Witherspoon killing an officer by the name of Mitchell Stone. Do you understand that?

A. I do.

Q. Now, is there anything about the charge of murder that starts you off feeling sympathetic in
R 749 this case?

A. No, there isn't.

Q. Is there anything about the charge that would cause you to feel that you are prejudiced?

A. No, there isn't.

Q. And if you're selected as one of the twelve jurors, will you base your verdict solely on the evidence as it is testified to on the witness stand under oath?

A. I will.

Q. You wouldn't bring into your deliberations as a juror something from outside the courtroom, such

as TV, newspapers or something you picked up in your reading as to how a trial should be or what the facts should be, would you?

A. No, I wouldn't.

THE COURT: Mr. Kissane, let me make this suggestion. Those last two or three questions you have asked, these jurors have heard them time and time again and they understand and they know what this case is all about, so just ask the general question. You heard the general questions asked the preceeding jurors, you understand what this is all about and is there any reason why you can't be a fair juror?

R 750 Ask any question you want about their background but, as for going into the details of the murder charge, they have all been here and they understand what both sides want.

Do you understand that?

MR. KISSANE: Yes, Judge.

THE COURT: Start to do that and we will save time that way.

MR. KISSANE: Yes, Judge.

Q. Now, when you were seated out in the courtroom and in the box, did anything come to your mind that indicated to you you could not be a fair and impartial juror?

A. No, there wasn't anything.

Q. Now, if you're selected as one of the twelve jurors, would you base your verdict solely as to what the facts are on what you hear testified to under oath from the witness stand?

THE COURT: You don't need to answer that.

Now, she understands that. They all understand that. I have told them that, to start with, and I think both lawyers have asked that question and the jurors understand that this case has to be tried on the evidence they hear from the witness stand and the law
R 751 that the court gives to them. Proceed.

MR. KISSANE: Yes, sir.

Q. If you're selected as one of the twelve jurors and you have heard all the evidence and the instructions of his Honor and you're back in the jury room and it should be your opinion, along with the other eleven jurors, that the defendant Witherspoon is guilty of murder and that the proper verdict in this case is that of death in the chair, would you say so by signing a guilty verdict?

A. I would.

Q. Have you ever been in a courtroom prior to coming here as a juror?

A. No, I have not.

Q. Have you ever heard of this case before?

A. No.

Q. Do you know any of the counsel at the table?

A. No, I don't.

Q. You didn't recognize any of the names of the witnesses?

A. No.

Q. As you sit there now, do you feel that you can give the defendant and the State a fair and impartial
R 752 trial?

A. I do.

R 758 *Examination by Mr. Cernek.*

Q. Is that Miss or Mrs. Blaha?

A. It's Miss.

R 759 Q. Miss Blaha, what other members of the family are there aside from yourself? Do you have any brothers or sisters?

A. Just a brother.

Q. What does he do?

A. He's a sales promoter for the Commonwealth Edison.

Q. And you have been a resident of Chicago all your life?

A. Right.

Q. How long have you been with Travelers?

A. 34 years.

Q. And you're in the Claim Department, is that right?

A. That's right.

Q. Now, is that automobile liability?

A. All lines.

Q. And is your job typing up drafts and letters and so forth?

A. No. Getting lien claims ready for the attorneys.

Q. Would the fact that a young police officer met his death in this case cause you to start out with a feeling one way or another in this matter?

A. No, it doesn't.

Q. If it develops that the State proves in this court that the defendant here, William Witherspoon,

had a prior conviction of some sort, would that cause you to feel prejudiced against the defendant?

A. No.

Q. You'd reserve your judgment in the case until you had heard all of the evidence, is that right?

A. Right.

Q. You understand that the State has the burden of proving him guilty beyond a reasonable doubt?

A. I do.

Q. And you have no quarrel with that?

A. No.

Q. He doesn't need to prove anything here under our law. You understand that?

A. Yes.

Q. And you have had no prior jury service?

A. No, I didn't.

R 752 WILLIAM BEUKE, called as a prospective juror, being first duly sworn, was examined as follows:

R 753 *Examination by Mr. Kissane.*

Q. The gentleman who moved into the first panel. Your name, sir?

A. William Beuke, B-e-u-k-e.

Q. Your home address, sir.

A. 12230 South Loomis.

Q. How long have you lived at that address?

A. Five years.

Q. And with whom do you reside there?

A. My wife and two children.

Q. How old are your children?

A. Thirteen and two and a half.

Q. What's the nature of your employment?

A. I'm a professional photographer.

Q. And by whom are you employed?

A. The Peoples Gas Light and Coke Company.

Q. How long have you worked for the People's Gas?

A. 24 years.

Q. And all the time you worked for Peoples Gas your employment has been that of a photographer?

A. That's right.

Q. Have you lived in and around Chicago all your life?

R 754 A. Yes, sir.

Q. What schools did you attend?

A. Cook Elementary and Englewood High.

Q. Is your wife gainfully employed?

A. No, sir.

Q. Prior to your marriage, was she employed?

A. Yes, sir.

Q. Just, in general, what type of work did she do?

A. Worked for the Illinois Bell Telephone Company as an operator.

Q. Now, did any of the questions asked of any of the preceding jurors brought anything to your mind that indicated to you you could not be a fair and impartial juror?

A. No, sir.

Q. You understand, do you, that the charge in this indictment is that of murder?

A. I do.

Q. And you don't know any of the counsel at the table?

A. No, sir.

Q. You didn't recognize the names of any of these witnesses that his Honor read yesterday?

A. No, sir.

Q. Were you here yesterday when the Judge read
R 755 the list of witnesses?

A. Yes, sir.

THE COURT: Oh, every juror in the room has heard that—those in the box and those back there. That's all been settled.

MR. KISSANE: We're starting out on a fresh day and I want to be sure what the situation is.

THE COURT: You may be sure that every juror in the courtroom heard the list of witnesses read.

MR. KISSANE: Yes, Judge. Thank you.

Q. Now, have you ever been in a courtroom prior to coming here yesterday, on Monday?

A. Yes, sir.

Q. And where would that be?

A. Downtown.

Q. Was that as a juror or a witness or a party in a case?

A. As evidence.

Q. You testified in a case?

A. That's right.

Q. Were you just a witness or were you one of the parties involved in the litigation?

A. A witness.

Q. Now, do you carry over, from that experience,
R 756 anything that would affect your service here as a juror for the charge of murder?

A. No, sir.

Q. And as you sit there now, knowing your past experience in life, is there anything that comes to your mind that you think would affect your service here as a juror?

A. No, sir.

A. Is there anything in your mind, yesterday or today, that indicated to you that you could not be a fair and impartial juror?

A. No.

Q. If there was you'd tell us now, wouldn't you?

A. Yes.

Q. You understand that these questions are to familiarize yourself with your duties here as a juror and also, in turn, have counsel be familiar, you know, with your service here. Do you understand that?

A. Yes, I do.

Q. Now, the penalties in this State, where the charge is murder, is that of death in the chair, life or any number of years from 14 upwards, such as, 199 or any number of combinations of years the juror feels proper under the law and the evidence in any
R 757 particular case. Do you understand that?

A. Yes, I do.

Q. Now, where the charge is murder, the jurors, in addition to determining the guilt and innocence, in determining the guilt of the defendant, have the additional duty of fixing a penalty they deem proper under the law and the evidence of the case. Do you understand that, sir?

A. Yes, sir.

Q. Now, is there anything about the fact that you have to determine guilt or innocence and also fix a penalty that you'd regard as an undue hardship or burden? Would you find it an unusual hard or difficult burden to assume the fact that you'd have to determine the guilt or innocence and fix a penalty upon the determination of guilt?

A. No.

Q. Now, if you're selected as one of the twelve jurors and it should be your opinion, along with the other eleven jurors, after having heard all the evidence and the rules of law given by His Honor and you're back in the jury room, it should be your opinion, along with the other eleven, that the defendant is guilty, and the next part of your deliberation is
R 759 to fix a penalty, and when you're at the penalty part of the deliberations it should be your opinion, along with the other eleven jurors, that the proper verdict in this case is that of death in the chair, based on the evidence as you have heard it here and the rules of law given by his Honor, would you so say by signing a guilty verdict?

A. Yes,

Q. So, as you sit there now,—

You pronounce your name Mr. Beuke?

A. Beuke.

Q. (Continuing) —do you feel that you can give the defendant and the State a fair and impartial trial?

A. Yes, sir.

R 761 *Examination by Mr. Cernek.*

Q. Mr. Beuke, you have been with the Peoples Gas since leaving school, is that correct?

A. No, not since leaving school?

Q. What did you do before your present job?

A. The same type of work.

Q. And by whom were you employed?

A. Manz Engraving.

Q. Pardon me?

A. Manz Engraving.

Q. Where's that, sir?

A. On Irving Park.

Q. Did you hear anything about this case, Mr. Beuke, before coming to court today?

A. No, sir.

Q. Do you have any brothers?

A. No.

Q. Sisters?

A. Yes.

Q. And how many do you have?

A. One sister.

Q. Is she married?

A. Yes.

Q. What does her husband do?

A. He works for Precision Steel.

Q. Have you or any member of your family ever been the victim of a criminal offense?

A. No.

R 762 Q. You have never been in court before excepting for that one instance as a witness in a civil case, is that correct?

A. Well, it's numerous similar cases.

Q. You have testified quite often, then, in civil matters?

A. Yes.

Q. In your professional capacity as a photographer?

A. Correct.

Q. Of course, you know that the defendant here has an interest in the outcome of this case?

A. Yes.

Q. And if he takes the stand and testifies in his own behalf, you won't let the fact that he has an interest in the outcome influence the weight that you will give his testimony, is that correct, sir?

A. That's right.

Q. In other words, you will use the same rules, in evaluating the credibility of his testimony as you will use in evaluating that of any other witness?

A. That's correct.

Q. And you will give both the State and the defendant a fair trial, is that right?

A. Yes, sir.

R 763 Q. And you will reserve judgment until you have retired to the jury room?

A. Yes.

Q. You have heard the questions that were asked of the other three jurors in the panel. If those same questions were asked of you, Mr. Beuke, would your answers be substantially the same?

THE COURT: Q. What he means by that is, has there been anything that has come out in the question of any ither juror that raises any doubt in your mind that you couldn't be a fair juror?

A. No.

MR. CERNEK: Q. You could be a fair juror, then?

A. Yes.

MR. CERNEK: The defense will accept the panel.

THE COURT: Very well. Let the record show that the first panel of four have been accepted by both sides.

R 772 ERNEST SPARROW, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Kissane.

Q. The gentleman sitting next to Mr. Stuebe.

A. Ernest Sparrow, S-p-a-r-r-o-w.

R 773 Q. Your home address?

A. 6145 S. Seeley.

Q. And how long have you lived at that address?

A. Three and a half years.

Q. And wiith whom do you reside there?

A. My wife and three children.

Q. How old are your children?

A. Six, three and a half and two and a half.

Q. Prior to your living at 6145 S. Seeley, where did you reside, sir?

A. 7013 S. Rockwell.

Q. I'm sorry, I didn't get that street.

A. South Rockwell.

Q. How long did you live at that address?

A. A year.

Q. What is the nature of your employment?

A. I'm an advertising promotion assistant.

Q. Of what organization?

A. Libby, McNeil and Libby.

Q. How long have you worked for Libby McNeil?

A. 11 years.

Q. 11 years?

A. Yes, sir.

Q. What one of Libby McNeil's products are as-
R 774 signed to you in the way of promotion—baby foods or what?

A. No sir. Vegetables, pickles and olives.

Q. Has that been your employment, your work life, the advertising field, or have you done other types of work or has that been your employment in the advertising field?

A. I have done sales work previously.

Q. What type of products did you sell?

A. Libby's foods and canned foods.

Q. Has Libby been your only employment, your only employer?

A. No, sir.

Q. When you say 11 years as a promotion man, you're including your sales experience along with it?

A. Yes, sir.

Q. Well, prior to working for Libby McNeil, what type of work did you do, sir?

A. I had worked in advertising previously for Sears, Roebuck, for a cleaner and laundry in Memphis, Tennessee, and for the newspaper there.

Q. Did you attend schools down in Memphis?

A. Yes, sir.

Q. What schools did you attend, sir?

A. Memphis State College.

R 775 What did you major in?

A. And the University of Mississippi.

Q. What did you major in, sir?

A. Advertising.

Q. Now, as you sit there now, knowing your past experience in life, is there anything that indicates to you you cannot be a fair and impartial juror?

A. No, sir.

Q. And when those questions were asked by the various counsel and his Honor and myself of the preceding jurors, did anything come to Mr. Sparrow's mind that indicated to him that he didn't feel he could be a fair and impartial juror?

A. No, sir.

Q. If you're selected as one of the twelve jurors, would you base your verdict solely on what you hear testified to under oath and the rules of law as given to you by His Honor?

A. Yes, sir.

Q. And the charge in this case being that of murder, do you understand, sir, the penalties in this State for murder are death in the—

THE COURT: You don't need to repeat that question. Is it your final question? No need to repeat
R 776 that. The jurors all understand it. Ask your final question.

MR. KISSANE: Yes.

Q. Do you understand that as a juror that where the charge is murder that you have the function, where you determine the defendant guilty, to still fix a penalty? Do you understand that, sir?

A. Yes, sir.

THE COURT: You don't need to answer that question. Ask your final question, counsel.

Now, ladies and gentlemen of the jury, you all understand that recently the Supreme Court passed a rule to speed up the picking of jurors and it's even hard for the judges on the bench to adapt themselves to it and it's especially hard for lawyers. We usually take three or four days to pick a jury in a murder case. So when I criticize counsel for both sides and urge them to speed it up, don't blame them because they have been raised on the old system as I have.

Ask your last question, counsel. Go ahead.

MR. KISSANE: Q. Mr. Sparrow, if you're one of the twelve jurors and it should be your opinion, based on the evidence as you have heard it here and
R 777 the rules of law as given by his Honor, that the defendant is guilty of the murder of Officer Stone, based on the evidence here and the law as given by

His Honor, it should be your feeling, along with the other eleven jurors, that the proper penalty in this case is death in the chair, would you so say by signing a guilty verdict?

A. Yes, sir.

Q. So as you sit there—

THE COURT: No. You're through with him. He has already told you that he had heard all the questions and there is nothing that comes to his mind that leads him to believe that he wouldn't be a fair juror. Take the next juror.

R 797 *Examination by Mr. Shelton.*

Q. Mr. Sparrow, you have three children six, three and two and a half, is that right?

A. In thinking about that, I believe the younger child is a little younger. About two.

Q. I see. And have you or any member of your family or any one of your friends been the victim of any criminal act?

A. No, sir.

Q. You never have. Would you like to serve on this jury, Mr. Sparrow?

A. Yes, sir.

Q. Now, you served on a civil jury downtown, I believe you testified, didn't you? You said that?

A. No, sir.

Q. You never have?

R 798 A. No, sir.

Q. I see. Excuse me. Do you have any relatives that are policemen or any close friends that are policemen, Mr. Sparrow?

A. No, sir.

Q. Now, when you said that you would be free of any sympathy, you meant sympathy toward either side, of course, is that correct? Not only the State but Mr. Witherspoon and the defense as well, is that correct?

A. That's correct.

R 808 ALMA RUFF, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Shelton.

Q. Ma'am, would you give me your name, please?

A. Alma Ruff.

Q. How do you spell that?

A. A-l-m-a R-u-f-f.

Q. Is that Miss or Mrs.?

A. Mrs.

Q. Mrs. Ruff, where do you reside?

A. 5308 S. Lowe Avenue.

Q. With whom do you live at that address?

A. Myself.

R 809 You live alone?

A. Yes, sir.

Q. How long have you been living at 5308 S. Lowe?

A. Nine years.

Q. And where did you live previous to that?

A. 513 W. 32nd Street.

Q. You have lived in Chicago most of your life?

A. All my life.

Q. Did you go to school here in Chicago?

A. Yes, sir.

Q. What schools did you attend?

A. I attended Healy Elementary School.

Q. Are you employed?

A. Yes, sir.

Q. Where do you work, Mrs. Ruff?

A. International Chemical Company.

Q. Where are they located?

A. 3140 S. Canal Street.

Q. And what do you do there?

A. I work in the printing office. I work on a machine and do all general printing work.

Q. And how long have you worked for the International Chemical Company?

R 810 A. 41 years.

Q. That's a steady job, I would say. Mrs. Ruff, have you or any member of your family ever been the victim of any crime?

A. No, sir.

Q. Do you have any children?

A. Yes. I have one son.

Q. And how old is he, approximately?

A. He's 23.

Q. Is he employed?

A. Yes, sir.

Q. Where does he work?

A. Western Electric.

Q. Right here in Chicago?

A. Yes, sir.

Q. He worked for Western Electric—

A. When he came out of high school he went to work for Western Electric.

Q. I see. Do you have any close friends or relatives that are members of the Police Force?

A. On the Police Force?

Q. Yes.

A. Well, my daughter-in-law's brother-in-law was on the Police Force.

R 811 Q. I see. Have you ever had occasion to discuss police work with him there, any cases with him?

A. No.

Q. What did your husband do, Mrs. Ruff?

A. My husband was an electrician. My husband is in a mental institution.

Q. Have you had any previous jury duty?

A. No, sir.

Q. This is the first time you have ever been in a courtroom?

A. That's right.

Q. Would you like to serve on this jury?

A. Yes, I would.

R 814 *Examination by Mr. Kissane.*

Q. Mrs. Ruff, prior to your marriage, what was your name?

A. Minnich, M-i-n-n-i-c-h.

Q. How long did you live at 513 West 32nd Street?

A. Nine years.

Q. Have you lived on the south side of Chicago all your life?

A. Yes, sir.

Q. And you attended schools out there?

A. That's right.

Q. And you're working out there?

A. That's right.

Q. 41 years in one place of employment?

A. One place.

Q. Now, you heard Mr. Cernek yesterday mention that the person killed in this case is a police of-
R 815 ficer. You heard him say that, didn't you?

A. Yes, I have.

Q. Now, the fact that the deceased in this case is a policeman—does that in any way cause you to feel sympathetic in this matter?

A. No, sir.

Q. And does it cause you to feel prejudiced in any way?

A. No, sir.

Q. Would you allow sympathy or prejudice to affect your service here as a juror?

A. No, sir, I would not.

Q. You understand, do you, the only thing you're to consider in this case is what is testified to under oath and the rules of law as given by his Honor Judge Salter? Do you understand that?

A. Yes, sir.

Q. You're not permitted to permit sympathy or prejudice to come in and color your deliberations.

MR. CERNEK: I object to that question, your Honor.

THE COURT: Yes. That's the same question asked three times. That's not necessary, counsel. Proceed.

MR. KISSANE: I wasn't aware that there was
R 816 any rule that I couldn't ask them the same question.

THE COURT: Proceed, counsel. Proceed, now. I thought I made myself clear here that I'm trying to enforce Rule 26-1. Now, proceed. Ask any questions you want as to their background; but, as to these general questions, there is no need to rehash them over and over. These ladies and gentlemen have been here so they know all about it. They're way ahead of us. They understand what this case is all about. Find out from them. After you have inquired into their background, find out and assure yourself that they believe they can be a fair juror and go on to the next one.

MR. KISSANE: Q. You live at 5308 S. Lowe?

A. That's right.

Q. Now, your boy. Where does he live?

A. My son lives in the basement apartment.

Q. At the same place?

A. At the same place.

Q. That's the family home, is it?

A. Well, it belongs to my niece. And she lives in the middle flat and I live up above.

Q. I wasn't quite clear. You said the brother-in-law of a daughter-in-law is a policeman, is that right?

R 817 A. That's right.

Q. He's a Chicago policeman, is he?

A. Yes, sir.

Q. Did you recognize any of the names of the witnesses that were read here yesterday?

A. No, sir, I did not.

Q. Have you ever heard of this case before?

A. No, sir.

Q. And if you're selected as one of the twelve jurors and it should be your opinion, based on the evidence as you have heard it here testified to under oath and the rules of law given you by his Honor Judge Salter, that the defendant Witherspoon is guilty of the murder of Officer Stone, would you say so by signing a guilty verdict?

A. I would.

Q. Having arrived at that point in your deliberations, would you then proceed to fix a penalty that you and your fellow jurors deemed proper under the law and the evidence in this case?

A. Yes, sir.

Q. Now, if it should be your opinion, along with the other eleven jurors, and you're at that phase of your deliberations with reference to fixing the pen-
R 818 alty you deem proper in this case,—it should be your opinion, along with the other eleven jurors, that the defendant Witherspoon should be given death in the chair, would you so say by signing a guilty verdict?

A. I would.

Q. Did anything come to your mind, when his Honor asked questions, Mr. Cernek, now Mr. Shelton

or myself,— did anything come to your mind, before you were asked questions, that indicated to you that you didn't want to serve in this case?

A. No, sir.

Q. So, as you sit there now, can you give the defendant and the State a fair and impartial trial?

A. Yes, I can.

Q. What schools did your boy attend?

A. He attended Healy Elementary School and Tilden High School.

Q. And then, from there, he went on to Western?

A. He went on to Western Electric.

R 891 FRED RACINE, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Kissane.

Q. The gentleman who moved into the panel. Your name, sir?

A. Paul S.—

Q. Pardon me. The man in back of Mrs. Ruff.

A. Fred Racine.

Q. You spell your last name, sir?

A. R-a-c-i-n-e.

Q. And your home address?

A. 3634 S. 56th Court, Cicero.

Q. How long have you lived at that address?

R 892 A. Fourteen years.

Q. And with whom do you live at that address?

A. My wife and son.

Q. How old is the boy?

A. Fourteen.

Q. What is the nature of your employment, sir?

A. Tool and die maker.

Q. And by whom are you employed?

A. Western Electric.

Q. How long have you worked for Western?

A. 24 years and nine months.

Q. Prior to working for Western, where were you employed? Was it in the tool and die field? Has that been your work?

A. Yes, that was my work.

Q. And have you lived in and around Chicago all your life, sir?

A. Yes, sir.

Q. Where did you attend schools?

A. LaVergne Grammar School in Berwyn and Morton High School in Cicero.

Q. In addition to the family at home, do you have other members of your family, such as, brothers and sisters living in and around Chicago?

R 893 A. Yes, I have a brother living in Lemont and I have a sister living in Lyons. A sister and brother-in-law.

Q. Generally, what is the employment of your brother in Lemont?

A. A clerk for Western Electric.

Q. Now, have any of the questions asked of any of the preceding jurors brought anything to your

mind that indicated to you you cannot be a fair and impartial juror?

A. No.

Q. If you're selected as one of the twelve jurors, would you base your verdict in this case solely on what you hear testified to under oath from the witness stand and the rules of law as given by his Honor Judge Salter?

A. Yes, sir.

Q. You won't bring anything else into your deliberations, will you?

A. No, sir.

Q. Now, if it should be your opinion, along with the other eleven jurors, that the defendant Witherspoon is guilty of the murder of Officer Stone, would you so say by signing a guilty verdict?

A. I would.

R 894 Q. And having arrived at that, upon your deliberations, would you then fix a penalty that you and your fellow jurors deemed proper under the law and the evidence in this case?

A. I would.

Q. If it should be your opinion that death in the chair is a proper verdict in this case, would you say so by signing that type of a verdict?

A. I would.

Q. As you sit there now, can you give both sides a fair and impartial trial, sir?

A. Yes, sir.

R 896 *Examination by Mr. Shelton.*

Q. Mr. Racine, what is your occupation?

A. Tool and die maker.

Q. And have you had any prior jury experience, Mr. Racine?

A. Yes, sir. In the Circuit Court about 20 years ago.

Q. Was that a civil or a criminal case?

A. Civil.

Q. Other than that, that's the only time you have been in a courtroom?

A. No. I was in as a witness in an accident one time.

Q. For the plaintiff or the defendant?

A. The defendant.

Q. For a defendant?

A. Yes, sir.

Q. Is that the only time you have been in a courtroom— those times you just told me about?

A. That's right.

Q. Do you have a sister living in Lyons?

A. Yes, sir.

Q. What does her husband do?

A. Her husband is an accountant for Western Electric.

R 897 Q. Is your sister employed, Mr. Racine?

A. No, sir.

Q. Now, you don't have any quarrel with the law about the burden of proof that's required in a criminal case, do you, Mr. Racine?

A. No, sir.

Q. You understand what it is?

A. Yes, sir.

Q. It's different than in a civil case. The State must prove beyond a reasonable doubt the defendant's guilt?

A. That's right.

Q. And, after hearing all the evidence and hearing the charge by the court, if you retire to the jury room for a verdict and you feel and it's your opinion that the defendant is not guilty, you won't hesitate in returning a not guilty verdict, will you?

A. That's right.

Q. In other words, you will give sides, not only the State but both sides, a fair trial?

A. Yes, sir.

Q. And the fact that there may be police officers testifying here, that in itself won't cut any ice with you, as far as credibility is concerned, will it?

R 898 A. No, sir.

Q. You will use your own rules for judging the same as any other person?

A. Yes, sir.

Q. Now, if the State, Mr. Racine, shows that the defendant has a prior conviction, that fact in itself won't prejudice you one way or another, will it? In other words, you will make up your mind from the basis of the evidence as you hear it from the witness stand?

A. That's right.

Q. Anything that's happened in the past you won't consider?

A. No, sir.

MR. SHELTON: Thank you, Mr. Racine. You sit there.

R 906 ALBERT KLEIN, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Shelton.

Q. May I have your name, sir, the gentleman that is sitting behind Mrs. Ruff?

A. Albert Klein.

R 907 Q. K-l-e-i-n?

A. K-l-e-i-n.

Pardon me, before we proceed with all the questioning, I'd like to know the first name of the officer that—

Q. Mitchell Stone.

A. Mitchell. There was a Stone that I did know, which I don't know if he was a policeman or not, that we went to school with, and I wasn't sure that that was the one. I heard he was an officer but I didn't know for sure who that was. This is school chums, way, way back.

Q. I see. Now, the fact, Mr. Klein, that you had a school chum that later became an officer, would that prejudice your thinking at all in any way?

A. I believe it would prejudice me if I know it was this particular person.

THE COURT: You're satisfied, though, now that it's not the same person?

A. Yes, sir.

THE COURT: All right, proceed, gentlemen.

MR. SHELTON: Q. Mr. Klein, where do you reside?

A. At 2000—74th Avenue, Elmwood Park.

Q. Elmwood Park?

R 908 A. Yes, sir.

Q. How long have you lived there, Mr. Klein?

A. A little over six years.

Q. And where did you reside before that, Mr. Klein?

A. 3828 W. Gladys Avenue, Chicago.

Q. 3828?

A. West Gladys.

Q. You have lived in Chicago or this area most of your life, Mr. Klein?

A. Yes, sir.

Q. Who lives with you at your home in Elmwood Park?

A. My wife and two children.

Q. How old are the children, Mr. Klein?

A. 13 and 12.

Q. Did you go to school here in Chicago?

A. Yes, sir.

Q. What schools did you attend?

A. St. Thomas Aquinas and John Marshall and Carl Schurz, I went to, also.

Q. And what do you do for a living, sir?

A. Plant engineer.

Q. And where are you employed?

R 909 A. Apex Bolt Product Company, 452 N. Claremont.

Q. How long have you worked there?

A. 13 years.

Q. And previous to that?

A. Haber Screw Company.

Q. And what is the nature of your work at Apex Bolt? Exactly what do you do there?

A. Well, it's trouble shooting on machinery, making sure that production is moving and correcting the fault and deficiencies in the machinery.

Q. Is your wife employed, Mrs. Klein?

A. Yes, she is.

Q. Where does she work?

A. The YMCA.

Q. What is the nature of her job?

A. She's a part time office worker there.

Q. How long has she worked there?

A. About five years.

Q. Do you have any brothers or sisters or any of the family living in this immediate vicinity?

A. One brother.

Q. What does he do?

A. He's a machinist.

Q. Where does he work, Mr. Klein?

R 910 A. Signode Steel Strapping Company.

Q. Was your wife from this area?

A. Yes.

Q. Have you ever served as a juror before, Mr. Klein?

A. No, sir.

Q. Is this your first time in the courtroom?

A. Yes, sir.

Q. I see. You never appeared as a witness or anything?

A. No, sir.

Q. Now, do you have any quarrel with that portion of the law which requires the State to prove its case beyond a reasonable doubt?

A. Would I have any quarrel?

Q. Yes. In other words, do you agree with that principle of law? In other words, in a civil case the plaintiff bears the burden of proving the case with a preponderance of evidence.

MR. KISSANE: I'm going to object. Under this 24-1, it's the strict province of the court to instruct on matters of law and not the examining counsel.

MR. SHELTON: I'm just asking him—

MR. KISSANE: I'm making an objection to the
R 911 court, that's all.

THE COURT: If I had been adhering strictly to the rules, we'd have had this jury picked yesterday afternoon. I'll allow the question. The jury will understand that the law will be given to you by the court.

PROSPECTIVE JUROR KLEIN: I understand that.

THE COURT: Proceed.

MR. SHELTON: Q. And you'll require the State to prove their case beyond any reasonable doubt?

A. Yes, sir.

Q. Now, Mr. Klein, is there any member of your immediate family or any one of your close friends who happens to be a policeman?

A. No, sir.

Q. The fact that policemen might testify in this case won't cloud your reasoning in any way and you'll require them to be put to the same tests for credibility as any other witness, is that right?

A. That's right.

MR. SHELTON: Thank you, Mr. Klein. We'll tender the panel, Mr. Kissane.

No, stay. Thank you.

THE COURT: All right.

R 912 *Examination by Mr. Kissane.*

Q. Mr. Klein, prior to living in Elmwood Park, you lived at 3828 Gladys, is that correct?

A. Yes, sir.

Q. Then, before that, you went to Schurz High School so you must have lived over northwest?

A. That was just evening classes.

Q. Your family consists of you and your brother, is that correct?

A. Well, I have two brothers.

Q. You mentioned one is a machinist for Signode. Is there another brother?

A. There's one in Colorado.

Q. I'm sorry. The other brother— what does he do?

A. Well, I don't hear from him very often. The last I heard he was driving a taxicab but he's a tool and die maker.

Q. Did you say he was in Colorado?

A. Yes.

Q. Now, did any of the questions asked of any of
R 913 the preceding jurors bring anything to your mind that would affect your service here as a juror?

A. No, sir.

Q. Which Y does your wife work in as a clerk?

A. Montclair-Leyden.

Q. Is that on Grand Avenue?

A. Yes, on Grand.

Q. If you're one of the twelve jurors and you have heard all the evidence and it's your opinion, along with the other eleven, that the defendant Witherspoon murdered Officer Stone and that the proper verdict is that of death in the chair, would you so say by signing a guilty verdict and fixing that type penalty?

A. Yes.

Q. You won't allow sympathy or prejudice in any way to color your deliberations as a juror, is that correct?

A. That's correct.

Q. Do you know any reason why you cannot be a fair and impartial juror?

A. No, I don't.

Q. How long have you lived at that address in Elmwood Park? I didn't get that.

R 914 A. A little over six years.

Q. And how long would that be at 3828 Gladys?

A. Two years.

MR. KISSANE: The State will accept the second panel.

THE COURT: All right, let the record show that the second panel of four has been accepted by both sides.

R 948 JOHN HAYES, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Wallace.

Q. Now, the first gentleman here in the gray suit. Will you tell us your name, please?

A. John Hayes.

Q. What is that last name?

A. Hayes.

Q. H-a-y-e-s?

A. Yes.

Q. Where do you live, Mr. Hayes?

A. At 6443 West 93rd Street, Oak Lawn.

Q. How long have you lived at that address?

A. Seven years.

Q. Are you married, Mr. Hayes?

A. Yes, sir.

Q. And do you have children?

A. Yes, sir.

R 949 Q. How many children do you have?

A. Two.

Q. And how old are they?

A. The girl is nine and the boy is six.

Q. Mr. Hayes, by whom are you employed?

A. Corn Products Company.

Q. What do you do at Corn Products?

A. I'm superintendent of the Printing Division.

Q. How long have you been with that organization?

A. Fifteen years.

Q. Now, Mr. Hayes, both of your children are of school age, is that right?

A. One is in kindergarten.

Q. And what grade is the other in?

A. Third.

Q. You have been sitting here for some time yesterday and heard the general questions that were being asked by the State's Attorney and by the attorneys for the defense?

A. Yes, sir.

Q. Now, is there anything that you heard during that questioning that might prejudice you in any way or might give you any preconceived ideas about this matter?

R 950 A. No, sir.

Q. Now, Mr. Hayes, do you have brothers and sisters?

A. No, sir.

Q. Do you have any friends or relatives who are on any Police Department?

A. No, sir.

Q. Do you think, Mr. Hayes, that you could, if you are selected as a juror, give both sides a fair and impartial trial?

A. Yes, sir.

Q. And that would be your intention, I presume?

A. Yes, sir.

Q. You, of course, realize, Mr. Hayes, that this matter of a trial starts out, in the first instance, by indictment?

A. Yes, sir.

Q. But you also understand that the indictment is nothing other than the process of starting the litigation and it doesn't give a presumption of anything against the defendant, is that right?

A. That's right.

Q. In other words, you understand that the defendant is presumed innocent until proven guilty?

A. Yes, sir.

R 951 Q. And that the State has the burden of proving that guilt?

A. Yes, sir.

Q. And they must do that beyond a reasonable doubt?

A. Yes, sir.

Q. Now, have you ever sat in any other court as a juror or as a witness, Mr. Hayes?

A. No, sir. I was a complainant in a Magistrate case about four years ago.

Q. What type of case was that, Mr. Hayes?

A. Well, there was a man in the neighborhood who had been shooting a rifle in a heavily populated area and I happened to see him and I signed a complaint.

THE COURT: There's one of those in every neighborhood.

THE PROSPECTIVE JUROR: We don't have this one any more, your Honor.

MR. WALLACE: Q. Well, was he a so-called hunter or was he just, as we describe him, a little—

A. Every time a dog would get in his yard he'd shoot him. I don't own a dog but I was worried about the bullets richocheting. That's the only time I have ever been in court.

Q. Now, Mr. Hayes, do you think that experience
R 952 might cause you to be prejudiced in any manner, shape or form against the defendant, Mr. Witherspoon?

A. No, sir.

Q. What you're telling us, then, is that this is quite a different situation?

A. Oh, yes, sir.

Q. Now, Mr. Hayes, you, of course, realize that Mr. Witherspoon has a very vital interest in this case?

A. Yes, sir.

Q. Would you take his testimony the same as you would take the testimony of any witnesses that the State might offer in this matter?

A. Yes, sir.

Q. Would you accept his testimony as given from the witness stand in the same light as the State might offer?

A. Yes, sir.

Q. Now, if the question of a past criminal record of the defendant were to arise, would that disturb you, Mr. Hayes, in this case before us?

A. No.

Q. Do you then think that you would be able to go straight down the middle until you had heard
R 953 both sides of this case?

A. Yes, sir.

Q. And that when you went to the jury room you would deliberate in your particular fashion and make your own particular decision?

A. Yes, sir.

MR. KISSANE: I object to that— his own particular fashion. He has to deliberate, based on the evidence as he heard it and the rules of law as given by your Honor.

THE COURT: That's understood, of course.

MR. KISSANE: If that's what's understood by "your own particular fashion," I have no objection. But it's what he heard here and the rules of law given by your Honor, not his own particular fashion.

MR. WALLACE: Well, Mr. Hayes, you would make your own decision on the evidence that you hear from the witness stand and the law as given by his Honor Judge Salter?

A. Yes, sir.

Q. Do you feel that you would like to sit on this jury?

THE COURT: I think, counsel, that question has been asked several times during the trial and I

R 954 haven't said anything about it. Of course, all these jurors want to serve. But to say they would like to sit on a particular case is rather confusing. You mean this particular case.

Q. Is there any reason why you feel you shouldn't sit on this case?

A. There is no reason why I feel that I shouldn't, but there is no reason why I particularly want to sit on this case, either.

MR. WALLACE: Q. I see. But if you do sit, you can give both sides a fair trial, is that right?

A. I believe I can, yes, sir.

MR. WALLACE: Thank you, Mr. Hayes.

R 975 *Examination by Mr. Kissane.*

Q. Mr. Hayes, as I understand it, you live seven years in Oak Lawn on 6443— Is that 93rd Street?

A. Yes, sir.

Q. And prior to that, where did you reside?

A. 7813—66th Street, Bedford Park.

Q. Have you lived in the southwest part of the county all your life?

A. Yes, sir.

Q. And where did you attend schools?

A. I attended Walsh and Graves Elementary schools in Argo-Summit, Argo Community High School and DePaul University.

Q. At DePaul, what particular one of the university schools were you in? What did you major in?

A. I majored in management.

Q. Business management?

A. Yes, sir.

Q. You were in the Commerce School?

A. I was in the Commerce School.

R 976 Q. And then, from there, you went to work at Corn Products, is that right?

A. I'd been working at Corn Products prior to that.

Q. You went to DePaul nights, is that it?

A. No, sir. But I maintained my seniority working weekends, vacations and holidays. There was always work down there at that time.

Q. You have now been there fifteen years.

A. Yes, sir.

Q. I couldn't quite hear that. You're an assistant superintendent, is that right?

A. Yes, sir. Of the Printing Division.

Q. And that's where you are now?

A. Yes, sir.

Q. Other than this one experience in a J.P. court involving the firing of the rifle in the town limits, that's the only time you had ever been in a courtroom, is that correct?

A. Yes, sir.

Q. And, with reference to this building, the first time you were ever here was Monday of this week, is that correct?

A. Yes, sir.

R 977 Q. Now, do you understand, as a juror, you're to base your verdict solely on what you hear testified to from the witness stand under oath?

A. Yes, sir.

Q. And, as to the rule of law, the rule of law you're to follow are the rules of law as given by his Honor Judge Salter. Do you understand that?

A. Yes, sir.

Q. And would you bring into your deliberations as a juror something that didn't develop on the witness stand and incorporate it into the rule that you thought was the rule of law rather than Judge Salter's rule?

A. No, sir.

Q. Similarly, would you allow sympathy or prejudice in any way to color your deliberations here as a juror?

A. No, sir.

Q. And, in listening to the testimony as it develops here in the courtroom, you'd use your native common sense or horse sense, in evaluating the credibility or truthfulness of witnesses, is that correct?

A. Yes, sir.

R 978 Q. Now, if you're selected as one of the twelve jurors, would you base your verdict in this case solely on what you hear testified to on the witness stand and the rule of law as given by His Honor Judge Salter?

A. Yes, sir.

Q. Now, should it be your opinion, along with the other eleven jurors, based on the evidence as you have heard it and the rule of law as given by His Honor, that death in the chair is a proper verdict in this case, based on the law and the evidence as you have heard it here, would you so say by signing a verdict fixing the penalty at death in the chair?

A. Yes, sir.

Q. If you had any reservations in your mind, you'd tell us at this time, is that correct?

A. Yes, sir.

Q. Now, you came in here— Would it be yesterday or Monday?

A. Yesterday before noon.

Q. Before the noon recess?

A. Yes, sir.

Q. And as questions were asked by his Honor and the various attorneys, of the preceding jurors, did anything come to Mr. Hayes' mind that indicated to him that he couldn't be fair and impartial?

A. No, sir.

R 989 Q. As you sit there now, knowing your past experience in life, does anything come to your mind that would affect your service here as a juror?

A. No, sir.

Q. Do you know of any reason why you cannot be a fair and impartial juror?

A. No, sir.

Q. Now, I didn't hear counsel ask you: Do you have any brothers or sisters or are your parents still living in and around Chicago?

A. I have no brothers or sisters. My parents are both living in Bedford Park.

Q. In General, what has been the employment of your father?

A. He's a mechanic for Corn Products Company.

R 964 PAUL GRADY, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Wallace.

Q. Now, sir, will you tell us your name?

A. Paul Grady.

Q. That last name.

A. G-r-a-d-y.

Q. Where do you live, Mr. Grady?

A. 1910 S. 5th Avenue, Maywood.

Q. How long have you lived there?

A. In this particular location, four years. About seventeen years altogether.

Q. In that area?

A. Yes, sir. About a couple of blocks from there.

Q. Are you married, Mr. Grady?

A. Yes, sir.

Q. Do you have children?

A. I have two, 19 and 17.

Q. And are they boys or girls?

A. Both boys.

Q. Now, what do these boys do, Mr. Grady?

A. The 19 year old boy is in college and the 17
R 965 year old boy is in high school.

Q. What college does the 19 year old go to?

A. Illinois Wesleyan at Bloomington.

Q. And what year is he in?

A. Sophomore.

Q. Now, Mr. Grady, by whom are you employed?

A. A. J. Heinz Company, 57 varities.

Q. 57 varities, sir?

A. Yes, sir.

Q. What office are you in?

A. I'm out of the Chicago office, 4141 West Chicago Avenue.

Q. How long have you been with that organization?

A. Twenty-four years.

Q. What is your position there?

A. Salesman.

Q. That's outside salesman?

A. That's right. I have a couple of headquarters accounts and I have some work at the store level, too.

Q. Mr. Grady, do you have brothers and sisters?

A. Yes, sir. I have three sisters and one brother.

Q. And those sisters. Do they live in Chicago?

A. No, sir. Two of them are in New York and one is in California.

R 966 Q. Are they married?

A. Yes, sir.

Q. What do their husbands do?

A. The two in New York for the State of New York and the one in California for Graumann Aircraft. He's a sort of a trouble shooter for them.

Q. The one that works for the State of New York. What does he do?

A. I think one is with the Highway Division and the other one, I think, worked for one of the mental instutions there in some capacity. I think there are

two or three in there but I forget which one he's associated with. Something like a matron only the male end of it, see?

Q. Now, has anything that has transpired here, as you have been sitting here, in the way of conversation or questions or answers,—has anything like that given you any preconceived ideas about anything in this trial, Mr. Grady?

A. No, sir.

Q. Do you feel that you can give the State and the defendant, Mr. Witherspoon, a fair trial?

A. Yes, sir.

Q. And if, after hearing the evidence from the wit-
R 967 ness stand and the law as given by his Honor Judge Salter, you feel that the State has not proven its case, then you would have no objection or no hesitancy in voting not guilty in this case, is that right?

A. That's right.

Q. And when you retire to the jury room, after hearing the witnesses and the instructions of his Honor, you'll make your decision and, of course, you realize that it has to be a concurrence of the 12 other jurors?

A. Yes, sir.

Q. As you sit there, Mr. Grady, is there anything you can think of that maybe we haven's covered that would prohibit you from sitting there as a fair and impartial juror?

A. Well, I don't say it would prohibit me from sitting here as a fair and impartial juror, but based on some of the other questions that you asked some of

the other prospective jurors, whether you have a friend that's a policeman, I do. There's a sergeant of police in Maywood a very good friend of the family.

Q. In Maywood?

R 968 A. Yes, sir.

Q. Do you think then, Mr. Grady, that that friendship might possibly cause an unevenness in your decision?

A. I don't think so.

Q. You don't think so?

A. No.

Q. Now, Mr. Grady, because, flatly, I believe you said you don't think that it would militate your friendship with this sergeant of police, can you say flatly that it wouldn't? This matter is so serious and Mr. Witherspoon is on trial here for his life.

A. No, I don't think it would.

MR. WALLACE: Thank you, Mr. Grady.

R 985 *Examination by Mr. Kissane.*

Q. Mr. Grady, prior to living at 1910 South 5th Avenue,—

Is that it?

A. Yes, sir.

Q. (Continuing) —you lived 17 years at other addresses in Maywood, is that right?

A. Right around the corner, yes, sir.

Q. And your employment has been that of a salesman for Heinz?

A. That's right.

Q. Has Heinz always had that location at 4141 West Chicago Avenue?

A. No, sir. When I started with them they were at, I think it was, 342 North Western, right next to the railroad tracks.

Q. Is this one of those new warehouses they built or an old one?

A. Right next to Hawthorne Melody.

Q. It's on the south side of the street there, is that right?

R 986 A. That's right.

Q. There just happened to be an old railroad yards there. They built these buildings there, is that where it is?

A. Yes, sir.

Q. Now, sir, prior to Monday of this week, had you ever been in a courtroom any where?

A. Well, about four years ago I was in the loop there in civil cases. I didn't serve as a juror.

Q. You mean you were there as a spectator?

A. I was there but I was called.

Q. You were called as a juror but you never sat in any particular type of case?

A. That's right. The only case I was called to involved a grocery store and, inasmuch as that was my business, I was excused.

Q. Now, other than that one experience when you were called as a juror in the civil court, you had never been in the courtroom before?

A. J. P. for failure to completely stop, so the officer said. I went through a stop sign.

Q. Other than those two experiences, had you ever been in a courtroom?

A. One other time on speeding. Just automobiles,
R 987 you know. In other words, in forty years of driving.

Q. Were they out in Maywood?

A. The one was in Maywood. The one I was talking about was in Maywood, the other was in Chicago.

Q. Is there anything about those two traffic situations that lingers on in your mind and would affect your service here in this jury trial?

A. No, sir.

Q. If there was something that you carried with you from those two incidents, you'd tell us, if it would, in your thinking, affect your service as a juror, is that correct?

A. Yes, sir.

Q. Because you understand now is the time to inform the court and the counsel that there is something in your mind that would affect your service here as a juror? Do you understand that?

A. Yes, sir.

Q. That's part of the reason why we ask these questions.

A. Yes, sir.

Q. And prior to Monday you had never been in this building before then?

A. No, sir.

R 988 Q. And if you're selected as one of the twelve jurors, in listening to the testimony, as it develops on

the witness stand, you understand that one of your functions would be to determine credibility, believability, that is, who you would believe. And, in determining that, you wouldn't completely disregard your normal common experience in life and your native intelligence, is that correct?

A. No, sir.

Q. You'd bring to your duties here as a juror your normal native intelligence and your common experience in life, in determining the credibility of witnesses, is that correct?

A. Yes, sir.

Q. And if you're selected as one of the twelve jurors, would you base your verdict solely, as to what the facts are, as to what you heard testified to from the witness stand under oath?

A. Yes, sir.

Q. You wouldn't bring into your deliberations, as to what the facts are, something that you thought might be the facts?

A. No, sir.

Q. And, similarly, as to the rule of law, would you
R 989 follow the rule of law as given by his Honor?

A. Yes, sir.

Q. His Honor will tell you what the law is that applies to a set of facts such as this at the end of all the evidence. Do you understand?

A. Yes, sir.

Q. And you wouldn't superimpose your thinking as to what the law is as contrasted as to what Judge Salter tells you is the law, would you?

A. No, sir.

R 1008 WAT T. CLUVERIUS, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Wallace.

Q. Will you tell us your name, please?

A. Wat T. Cluverius.

Q. How do you spell your last name, sir?

A. C-l-u-v-e-r-i-u-s.

Q. And you pronounce that how, sir?

A. Cluverius.

Q. Where do you live, Mr. Cluverius?

A. 10837 S. California Avenue, Chicago.

Q. Are you married, Mr. Cluverius?

A. Yes, sir.

R 1008 Q. Do you have children?

A. Both married.

Q. Girls or boys?

A. One girl and one boy.

Q. What does the boy do?

A. He's a lieutenant in the Naval Reserve now on the west coast.

Q. And is he a carreer man in the Navy, Mr. Cluverius?

A. No, I don't believe so.

Q. And the girl. Is she married?

A. Yes, sir. She lives in Park Forest. Her husband works for Standard Oil Company.

Q. Mr. Cluverius, by whom are you employed?

A. Moser Paper Company.

Q. And what do you do for that company?

A. I'm manager of the envelope manufacturing plant.

Q. How long have you been with that company?

A. Fourteen years.

Q. Mr. Cluverius, do you have any relatives or friends who are police officers?

A. Well, there was a man who worked under me who is now on the Police Force.

Q. What Police Force is that?

A. The Chicago Police Force.

R 1010 Q. How long did he work under you, Mr. Cluverius?

A. Oh, six or seven years.

Q. Mr. Cluverius, do you think the fact that he worked under you and for you would cause you to be prejudiced in this case, since a police officer is involved?

A. No, I don't believe so.

Q. Now, you say you don't believe so, Mr. Cluverius. Would you state that categorically?

A. I'd say no.

Q. Now, have you been here since Monday Mr. Cluverius?

A. No, since yesterday.

Q. You have heard the list of witnesses read by his Honor Judge Salter. Did you recognize any of those names?

A. No, I did not.

Q. Now, do you know any of the counsel here?

A. No, I do not.

Q. For the defendant.

A. No.

Q. You realize, of course, that the defendant starts out, the defendant, Mr. Witherspoon, starts out, with the presumption of innocence?

R 1011 A. I do.

Q. Does that law sound fair to you, Mr. Cluverius?

A. Yes, sir.

Q. And, after you have heard the testimony of the witnesses from the stand and the law from his Honor Judge Salter, do you feel that you could then retire to the jury room and give a fair decision to the State and to the defendant, Mr. Witherspoon?

A. Yes, I do.

Q. Have you ever sat on a jury before, Mr. Cluverius?

A. No, I have not.

Q. Have you ever been in this building before?

A. No, not until Monday.

Q. Have you ever been engaged in any type of litigation at all?

A. No, sir.

Q. Or complaints or anything like that?

A. No, sir.

Q. Now, you realize, of course, that the State must prove its case beyond a reasonable doubt?

A. I do.

Q. And the court will so instruct you. And if the court instructs you on that law, you have no quarrel with that law, do you Mr. Cluverius?

R 1012 A. No, I do not.

Q. You have heard the many questions and answers that have been bandied around yesterday and today from the various jurors and attorneys. Is there anything that strikes your mind or here has struck your mind during that time which would lead you off with any preconceived ideas?

A. No, I don't believe so.

Q. Now, if the fact exists that Mr. Witherspoon has a prior criminal record, would that prejudice you in this particular case?

A. No, sir.

Q. And, of course, you realize that Mr. Witherspoon has a very vital interest in this case?

A. Yes, I do.

Q. And would his testimony be accepted in the true light, as well as the testimony that the State's witnesses may have?

A. Yes, sir.

Q. You feel then, Mr. Cluverius, that you could give, upon hearing the evidence and the rules of law by his Honor Judge Salter, a fair and impartial trial to both sides?

A. Yes, sir.

R 1013 Q. And you would make the State prove its case beyond a reasonable doubt?

A. Yes, sir.

Q. Mr. Cluverius, have you heard anything about this case before?

A. No, sir, I have not.

Examination by Mr. Kissane.

Q. You pronounce your name, sir, Cluverius?

A. Yes, sir.

Q. Prior to living at 10837 S. California—

Do you live across from the cemetery or the Ridge Country Club there?

A. From the cemetery.

Q. How long have you lived at that address?

A. 14 years.

Q. And prior to living at this address, where did you reside?

A. Well, mostly on the east coast, around Boston.

Q. Around where?

A. Boston.

R 1014 Q. You attended schools in Boston, then, is that it?

A. No. I attended the Naval Academy in Annapolis for two years and then various high schools up and down the east coast.

Q. When did you graduate from the Academy?

A. I didn't graduate. I was there two years.

Q. Well, originally, then, you lived in Boston and then came to Chicago?

A. Well, after serving in the Naval Reserve during the war, yes.

Q. Where did you attend grammar school and high school?

A. There were about seven or eight grammar schools and two or three high schools.

Q. Where would that be, sir?

A. Annapolis, Maryland, Washington, D. C., and Philadelphia, New York, Boston,—

THE COURT: That's enough.

MR. KISSANE: Q. You're part of a Navy family, is that it?

A. Yes, sir. My father was also in the Navy.

Q. And, prior to Monday of this week, had you ever had occasion to be in a courtroom anywhere, sir?

R 1015 A. No, sir.

Q. And, since you came out here Monday, did you ever come into any courtroom other than his Honor Judge Salter's?

A. I went downtown and was in Judge Tucker's courtroom.

Q. Judge Tucker's?

A. Yes, sir.

Q. Did you go to the jury box there?

A. Yes, I was. I was excused there.

Q. Now, your boy is in the Navy and your son-in-law works for Standard Oil?

A. Yes, sir.

Q. With reference to other than your father and you, did you have other and brothers and sisters in your family? What I'm getting at is this: The next question would be: In general, what is their work?

A. All in the Navy, sir.

Q. Now, you understand, and counsel talked to you, about the presumption of innocence and reasonable doubt?

A. Yes, sir.

Q. And you understand that these two presumptions are presumptions that are given to all defend-
R 1016 ants in all criminal cases. You understand that, don't you?

A. Yes, sir.

Q. That's part of our regular, normal legal procedure under our Constitutions. You understand that, don't you?

A. Yes, sir.

Q. And, sir, if you are selected as one of the twelve jurors in this case, would you base your verdict in this case solely on what you hear testified to from the witness stand and the rule of law as given by his Honor Judge Salter?

A. Yes, sir.

Q. And, from your past experience in life or your reading or the movies or the TV, you wouldn't bring into your deliberations as a juror something that you, Mr. Cluverius, thought should be the law, would you?

A. No, sir.

Q. And, when you sat here yesterday and today, did anything come to your mind that indicated to you you could not be fair and impartial in this case?

A. No, sir.

Q. Now, you understan from what has been said
R 1017 here in the last few days that you were aware that the charge in this case is that of murder, don't you?

A. I do.

Q. And the deceased in this case was a police officer?

A. I do.

Q. And is there anything about the charge in this case that would start you out feeling sympathetic or prejudiced one way or the other in this case?

A. No, sir, I don't believe so.

Q. Now, sir, if, after having heard all the evidence and his Honor instructs you and you and the eleven jurors retire to the jury room and proceed to deliberate to a verdict and it should be your your opinion and the other eleven, that the defendant Witherspoon is guilty of the murder of Officer Stone, would you so say by signing a guilty verdict?

A. Yes.

Q. Now, having arrived at that point in your deliberations as a juror, do you understand that you have the additional duty of fixing a penalty that you and your fellow jurors deem proper under the law and the evidence in this case? You understand that,
R 1018 don't you?

A. Yes, sir, I do.

Q. Now, at that phase of the deliberations as a juror, if it should be your opinion, along with the other eleven jurors, that this is a proper case for fixing the penalty at death in the chair for the defendant Witherspoon, for the murder of Officer Stone, would you so say by signing a guilty verdict and fixing death in the chair as the penalty?

A. Yes, I would.

Q. So, as you sit there now, do you feel you can give the defendant and the State a fair and impartial trial?

A. I would think so.

Q. As you have heard these other gentlemen, when people always qualify something, we have to ask the next question: Are you sure?

A. I'm sure.

Q. You said, "I think so." In normal talk, people say "I think so," and so on. But when we talk, and the various counsel, you heard them say, "You're sure?" That's the same question I have to ask you, when you say, "I think so." Is there any hesitation in your mind, sir?

R 1019 A. No.

Q. And you understand that the only way we can evaluate or you can evaluate your function as a juror is by your answers, so I hope you won't think I'm unduly asking too many questions.

A. No, not at all.

Q. Because it's not designed to do anything other than elicit information.

A. There is one thing I would like to state, though, and that is that I am personally acquainted with a gentleman in the State's Attorney's office.

Q. Who is that?

A. Mr. Sandquist. I don't feel that that would particularly influence me.

Q. Would that in any way affect your service here as a juror?

A. No, it would not.

R 1022 NED CALDERONE, called as a prospective juror, being first duly sworn, was examined as follows:

THE COURT: Q. Now, this last juror that's been called up. You have heard all the questions?

A. Yes, sir.

Q. Do you know any of the parties?

A. No, sir.

Q. Do you know any of the witnesses?

A. No, sir.

Q. Do you know anyone in the State's Attorney's office?

A. No, sir.

Q. Do you have any policemen that are your friends?

A. Policemen, yes.

Q. You know a policeman?

A. Neighbors in Chicago.

Q. Do you feel that that would affect your being a fair and impartial juror in this case?

R 1023 A. No, sir.

Q. Do you know of any reason why, if you're selected as a juror, you couldn't be a fair and impartial juror?

A. No, sir.

Q. You have heard all these questions that have been asked since early yesterday. Has anything come up, in the questioning of these other jurors, that should lead you to believe that you shouldn't sit as a juror is this case?

A. The only question I got, I've been in the Criminal Court Building here as a juror before in the Circuit Court.

Q. Did that prejudice you?

A. They asked that question, so I thought I'd bring it up.

Q. What's that?

A. They keep asking, "Have you ever served before?" and I thought I would bring it up.

Q. Is there anything in that service that would prejudice you for or against either party?

A. No, sir.

THE COURT: Proceed, counsel.

R 1024 *Examination by Mr. Kissane.*

Q. Your name, sir?

A. Ned Calderone, C-a-l-d-e-r-o-n-e.

And your home address, sir?

A. 3820 Gladys, Bellwood, Illinois.

Q. With whom do you reside at that address?

A. My wife and two children.

Q. How old are the children?

A. 6 and 4.

Q. What is the nature of your employment?

A. I'm a mechanic for Commonwealth Edison Company in Maywood.

Q. How long have you worked for Commonwealth Edison?

A. Well, 14 years.

Q. Have you lived in and around Chicago all your life?

A. Yes.

Q. And what schools did you attend, sir?

A. Sumner grade school and Crane Tech High School.

Q. Prior to working for the Commonwealth Edison Company, in general, what type of work did you do?

A. I worked at a printing company, and then I went in the service and I put a year in at Chicago
R 1025 Rivet and then I went to Commonwealth Edison.

Q. Now, referring to your prior jury service here in the Criminal Court, do you carry anything over from that experience that would in any way affect your service here as a juror where the charge is murder against the defendant Witherspoon and the deceased is Mitchell Stone?

THE COURT: You don't need to answer that question. You've already answered it.

Ask the next question.

MR. KISSANE: Q. How long ago was it that you sat on a jury out here?

A. The two weeks I was on one case; and that week to the last day and the man pleaded guilty and the judge sentenced him. It was a robbery case.

Q. And then you were downtown on civil cases, were you?

A. Yes, sir.

Q. How long ago was that?

A. Oh, about four or five years ago. I'm not too sure.

Q. If you're selected as one of the twelve jurors, would you base your verdict solely on what you hear testified to from the witness stand under oath?

A. Yes, sir.

R 1026 Q. And would you follow the rules of law as given by the presiding judge?

A. Yes, sir.

Q. If you had any other thoughts along that line, you'd tell us at this time, is that correct, sir?

A. Yes, sir.

Q. Did you recognize any of the names of the witnesses that were read here by his Honor yesterday when you came in?

A. No, sir.

Q. Do you know any of the counsel at the table?

A. No.

Q. Have you ever heard of this case before?

A. No, sir.

Q. Now, if you're one of the twelve jurors and, after having heard all the evidence from the witness stand under oath and the rules of law as given by his Honor, you're back in the jury room and it should be your opinion, along with the other eleven jurors, that the defendant is guilty of the murder of Officer Stone, would you so say by signing a guilty verdict?

A. Yes, sir.

Q. Now, having arrived at that point in your deliberations as a juror, do you understand that you

R 1027 have the additional function of fixing a penalty that you and your fellow jurors deem proper under the law and the evidence in this case?

A. Yes, sir.

Q. You understand that, don't you?

A. Yes, sir.

Q. Now, at that phase of your deliberations as a juror, if it should be your opinion, along with the other eleven jurors, that the defendant Witherspoon is guilty of the murder of Officer Mitchell Stone and the proper penalty here is that of death in the chair, would you sign that type of a verdict?

A. Yes, sir.

Q. If you had any reservation, you'd tell us at this time, is that correct?

A. Yes, sir.

Q. So, having in mind your past experience in life, is there anything that indicates to you you cannot be fair and impartial?

A. No, sir.

Q. And did any of those questions asked of any of the preceding ladies and gentlemen yesterday bring anything to your mind, sir, that would indicate to you that you could not be a fair and impartial juror R 1028 in this case?

A. No.

A. No.

THE COURT: You don't need to answer that question. You have already answered it.

MR. KISSANE: I wasn't aware that he had answered it, Judge.

THE COURT: Yes. I asked the identical question.

MR. KISSANE: Q. So, as you sit there now, do you feel that you can give the defndant and the State a fair and impartial trial?

A. Yes, sir.

Q. Would you base your verdict solely on what you hear testified to under oath and the rules of law as given by the Judge?

A. Yes, sir.

Examination by Mr. Wallace.

Q. Mr. Calderone, you say, categorically, that your knowing these policemen in the neighborhood wouldn't affect your judgment here or prejudice you in any way?

R 1029 A. No.

Q. And that you could give the defendant and the State a fair trial, is that right?

A. Yes, sir.

Q. Now, is there anything else, Mr. Caldrone, during the entire time you have been sitting here, that recalls something to your mind or would in any way prejudice you from giving a fair shake to both sides?

A. None.

MR. WALLACE: The defense will accept the panel.

APPENDIX B.

THE DECISION TO IMPOSE THE DEATH PENALTY IN JURY TRIALS A STATE STATUTE*

Jury has discretion to impose the death penalty. The Court is bound by the jury's decision.

Ala. Code tit. 14, §318 (1958)
Ariz. Rev. Stat. Ann. §13-453 (1956)
Ark. Stat. Ann. §43-2153 (1947)
Cal. Penal §190.1 (1967 Supp.)
Colo. Rev. Stat. Ann. §40-2-3 (1963)
Conn. Gen. Stat. Rev. §53-10 (1967 Supp.)
(1) Fla. Stat. §919.23 (1965)
(1) Ga. Code Ann. §26-1005 (1953) (murder conviction not based solely on circumstantial evidence)
Idaho Code Ann. §18-4004 (1948)
Ind. Ann. Stat. §9-1819 (1956)
Kan. Stat. Ann. §21-403 (1964)
Ky. Rule Crim. Proc. 9.84 (1963)
(1) La. Code Crim. Proc., art 817 (1950)
Md. Ann. Code, art. 27, §413 (1967)
(1) Miss. Code Ann. §2217 (1942)
Mont. Rev. Codes Ann. §94-2505 (1947)
Neb. Rev. Stat. §28-401 (1964)
Nev. Rev. Stat. §200.030 (1961)
N.H. Rev. Stat. Ann. §585:4 (1955)
(1) N.J. Rev. Stat. §2A:113-4 (1937)
(1) N.M. Stat. Ann. §40A-2a-2 (1954)
N.Y. Penal §125.35 (1944)
(1) N.C. Gen. Stat. §14-17 (1943)
N.D. Cent. Code §12-06-05, 12-27-13 (1959)
(1) Ohio Rev. Code §2901.01 (1953)
Okla. Stat. tit. 21, §707 (1961)

Pa. Stat. tit. 18, §4701 (1936)
(1) S.C. Code Ann. §16-52 (1962)
Tenn. Code Ann. §39-2405 (1955)
Tex. Code Crim. Proc. art. 37.07 (1966)
Utah Code Ann. §76-30-4 (1953)
Va. Code Ann. §19.1-291 (1950)
(2) Wash. Rev. Code §9.48.040 (1961)
(1) Wyo. Stat. Ann. §6-54 (1957)
(1) D.C. Code Ann. §22-2404 (1961)

The trial court alone fixes the death penalty or refuses to impose it. The jury does not participate in that decision.

Md. Ann. Code art. 24-461 (1957) (rape), art. 27-338 (1957) aggravated kidnaping

The jury may impose the death penalty, with the trial court bound by a jury determination of death. But the court may also ignore a recommendation of mercy and impose death.

Del. Code Ann. tit. 11, §571 and 11, §623 (1953)
Mandatory death penalty.
Ariz. Rev. Stat. Ann. §13-701 (1956) (treason)
Mass. Gen. Laws, ch. 265, §2 (1932) (certain murders)
Miss. Code Ann. §2397 (1942) (treason)
R.I. Gen. Laws Ann. §11-23-2 (1956) (murder while under sentence for murder)

Jury has the discretion to impose the death penalty. However, the judge may overrule the jury and choose not to impose it. The judge may not impose death if the jury has decided against such a penalty.

Ill. Rev. Stat. ch. 38, §9-1 (1965)
Missouri State v. Anderson, 384 S.W. 2d 591 (1965)
S.D. Code §13.2012 (1939)

B. Federal Statutes

Jury has discretion to impose the death penalty. The Court is bound by the jury's decision.

18 U.S.C. 34 (1964) homicide in course of federal aircraft or motor vehicle statutory violation

18 U.S.C. 1111 (1964) murder in territorial or martime jurisdiction

18 U.S.C. 1114 (Supp. I. 1965) murder of a federal officer

18 U.S.C. 1201 (1964) certain kidnapings

18 U.S.C. 1992 (1964) homicide in course of violation of federal railroad statutes

18 U.S.C. 2113 (1964) homicide in course of federal bank robbery

18 U.S.C. 1751 (a) (Supp. I, 1965) slaying of a president, etc.

49 U.S.C. 1472 (i) (1964) aircraft piracy

Jury may recommend death, but the judge need not follow such a recommendation.

18 U.S.C. 2272, 2274, 2275, 2276 (1964) (see F. R. Crim. Proc. 32) certain atomic energy violations

18 U.S.C. 837 (1964) homicide in course of violation of explosives act

No provision as to imposition of penalty. F. R. Crim. P. 32 suggests that the judge makes the decision after a hearing in mitigation.

18 U.S.C. 794 (1964) certain war crimes

18 U.S.C. 2031 (1964) rape in maritime or territorial jurisdiction

18 U.S.C. 2381 (1964) treason

18 U.S.C. 1751 (a) (Supp. I, 1965) homicide in course of kidnaping president

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* Unless otherwise indicated, the cited provisions are applicable to the most culpable grade of homicide in the various jurisdictions.

(1) Death penalty unless the jury decides otherwise.

(2) Life imprisonment unless the jury decides the death penalty should be inflicted.